No. 18-481

IN THE

Supreme Court of the United States

FOOD MARKETING INSTITUTE,
Petitioner,

v.

ARGUS LEADER MEDIA, D/B/A ARGUS LEADER,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

JOINT APPENDIX VOLUME I

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PETITION FOR WRIT OF CERTIORARI FILED OCT. 11, 2018
CERTIORARI GRANTED JAN. 11, 2019

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RELEVANT DOCKET ENTRIES

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT
No: 17-1346

Argus Leader Media v. Food Marketing Institute

DATE	PROCEEDINGS
02/15/2017	Civil case docketed. [4501828] [17-1346] (CYZ) [Entered: 02/15/2017 10:35 AM]
02/27/2017	STATEMENT of issues, METHOD of Appendix (separate), filed by Appellant Food Marketing Institute - w/service 02/27/2017. [4505827] [17-1346]--[Edited 02/28/2017 by MER] (DRF) [Entered: 02/27/2017 02:10 PM]
03/30/2017	RECORD FILED - EXHIBITS, Comments: 1 expandable folder of trial exhibits - see attached Exhibit List, Source Location: DC [4518402] [17-1346] (CYZ) [Entered: 03/30/2017 02:31 PM]
06/22/2017	RECORD FILED - SEALED TRANSCRIPT, Location STP, Comments: REBUTTAL TESTIMONY - Dist. Ct. Doc. #187, Source Location: DC, Dt. of Proceeding/Hearing: 05/25/2016, No. of Pgs.: 35, Court Reporter: Connelly, Jill Maurine - COPY DO NOT RETURN

DATE	PROCEEDINGS
	[4549947] [17-1346] (CYZ) [Entered: 06/22/2017 10:48 AM]
06/22/2017	RECORD FILED - TRANSCRIPT, Location STP, Comments: PRETRIAL CONFERENCE - Dist. Ct. Doc. #184, Source Location: DC, Dt. of Proceeding/Hearing: 05/19/2016, No. of Pgs.: 23, Court Reporter: Connelly, Jill Maurine - COPY DO NOT RETURN [4549948] [17-1346] (CYZ) [Entered: 06/22/2017 10:49 AM]
06/22/2017	RECORD FILED - TRIAL TRANSCRIPTS, Location STP, Comments: VOLUMES I & II - Dist. Ct. Doc. #185 & 185-1, Source Location: DC, Dt. of Proceeding/Hearing: 05/24/2016-05/25/2016, Court Reporter: Connelly, Jill Maurine - COPY DO NOT RETURN [4549951] [17-1346] (CYZ) [Entered: 06/22/2017 10:53 AM]
08/16/2017	**BRIEF FILED** - APPELLANT BRIEF filed by Food Marketing Institute. w/service 08/15/2017, Length: 12,822 words **10 COPIES OF PAPER BRIEFS FROM Food Marketing Institute due 08/21/2017 WITH certificate of service for paper briefs.** Brief of Appellee Argus Leader Media due on 09/15/2017 [4568987] [17-1346] (MER) [Entered: 08/16/2017 10:43 AM]

DATE	PROCEEDINGS
08/18/2017	MOTION interested party, National Grocers Association, for leave to file amicus curiae brief on behalf of Appellant - Food Marketing Institute. w/service 08/18/2017. [4570511] [17-1346] ATTACHED REQUIRED CERTIFICATE OF COMPLIANCE--[Edited 08/21/2017 by MER] (SDF) [Entered: 08/18/2017 04:34 PM]
08/21/2017	RESPONSE in opposition to motion [4570511-2], Interested Party motion [4570511-3] filed by Attorney Mr. Jon E. Arneson for Appellee Argus Leader Media, w/service 08/21/2017. [4570744] [17-1346] (JEA) [Entered: 08/21/2017 02:03 PM]
08/21/2017	PUBLIC DOCKET NOTE: Contacted counsel for interested party, National Grocers Association, and requested the required certificate of compliance for Motion for Leave to file Amicus Brief on behalf of Appellant. [17-1346] (MER) [Entered: 08/21/2017 02:18 PM]
08/21/2017	RECORD FILED - APLNT/PET APPENDIX, 1 volume, Location STL, Comments: 3 copies [4571154] [17-1346] (MER) [Entered: 08/22/2017 01:54 PM]

DATE	PROCEEDINGS
08/23/2017	JUDGE ORDER:Granting [4570511-2] motion leave to file amicus brief. National Grocers Association in 17-1346 has been changed to an amicus in this case. Adp Sep 2017 [4571851] [17-1346] (MER) [Entered: 08/23/2017 04:02 PM]
08/23/2017	**BRIEF FILED** - AMICUS BRIEF filed by National Grocers Association w/service 08/23/2017, Length: 3,392 words **10 COPIES OF PAPER BRIEFS FROM National Grocers Association due 08/28/2017 WITH certificate of service for paper briefs** [4571862] [17-1346] (MER) [Entered: 08/23/2017 04:14 PM]
10/17/2017	**BRIEF FILED** - APPELLEE BRIEF filed by Argus Leader Media, w/service 10/16/2017 , Length: 12,628 words **10 COPIES OF PAPER BRIEFS FROM Argus Leader Media due 10/23/2017 WITH certificate of service for paper briefs.** Reply brief of Food Marketing Institute due on 10/31/2017. [4590502] [17-1346] (MER) [Entered: 10/17/2017 04:07 PM]
10/23/2017	RECORD FILED - APLEE/RES APPENDIX, 1 volume, Location STL, Comments: 3 copies [4592844] [17-1346] (MER) [Entered: 10/24/2017 11:27 AM]

DATE	PROCEEDINGS
11/30/2017	**BRIEF FILED** - APPELLANT REPLY BRIEF filed by Food Marketing Institute. w/service 11/30/2017 , Length: 6,499 words **10 COPIES OF PAPER BRIEFS WITHOUT THE APPELLATE PDF HEADER FROM Food Marketing Institute due 12/05/2017 WITH certificate of service for paper briefs** [4605783] [17-1346] (MER) [Entered: 11/30/2017 04:12 PM]
03/14/2018	**ARGUED & SUBMITTED in St. Paul** to Judges Raymond W. Gruender, C. Arlen Beam, Jane Kelly on 03/14/2018 Mr. Gavin R. Villareal for Appellant Food Marketing Institute and Mr. Jon E. Arneson for Appellee Argus Leader Media. Rebuttal by Mr. Gavin R. Villareal for Food Marketing Institute RECORDED. Click Here To Listen to Oral Argument [4639263] [17-1346] (JMM) [Entered: 03/14/2018 10:03 AM]
05/08/2018	OPINION FILED - THE COURT: Raymond W. Gruender, C. Arlen Beam and Jane Kelly AUTHORING JUDGE: Jane Kelly (PUBLISHED) [4659075] [17-1346] (MER) [Entered: 05/08/2018 08:29 AM]

DATE	PROCEEDINGS
05/08/2018	**JUDGMENT FILED** - The judgment of the Originating Court is AFFIRMED in accordance with the opinion. RAYMOND W. GRUENDER, C. ARLEN BEAM and JANE KELLY Hrg Mar 2018 [4659084] [17-1346] (MER) [Entered: 05/08/2018 08:37 AM]
05/15/2018	MOTION for attorney fees in the amount of to be determined on remand., filed by Attorney Mr. Jon E. Arneson for Appellee Argus Leader Media w/service 05/15/2018. [4661656] [17-1346] (JEA) [Entered: 05/15/2018 11:37 AM]
05/15/2018	MOTION for limited remand, filed by Attorney Mr. Jon E. Arneson for Appellee Argus Leader Media w/service 05/15/2018. [4661673] [17-1346] (JEA) [Entered: 05/15/2018 11:45 AM]
05/21/2018	RESPONSE in opposition to motion for remand [4661673-2], motion for attorney fees [4661656-2] filed by Attorney Mr. Gavin R. Villareal for Appellant Food Marketing Institute, w/service 05/21/2018. [4663637] [17-1346] (GRV) [Entered: 05/21/2018 11:28 AM]

DATE	PROCEEDINGS
06/04/2018	JUDGE ORDER: Pursuant to Eighth Circuit Rule 47C(b), Argus Leader's motion for limited remand dated May 15, 2018, is granted. The case is remanded to the district court with instructions to determine the availability of attorney's fees pursuant to 5 U.S.C. § 552, and to enter judgment accordingly. [4661656-2] [4661673-2] Hrg Mar 2018 [4668745] [17-1346] (MER) [Entered: 06/04/2018 01:26 PM]
06/21/2018	PETITION for enbanc rehearing and also for rehearing by panel filed by Appellant Food Marketing Institute w/service 06/21/2018 [4674655] [17-1346] (GRV) [Entered: 06/21/2018 09:52 AM]
07/13/2018	JUDGE ORDER:Denying [4674655-2] petition for enbanc rehearing filed by Appellant Food Marketing Institute. The petition for panel rehearing is also denied. [4674655-3] PUBLISHED ORDER. Hrg Mar 2018 [4682115] [17-1346] (MER) [Entered: 07/13/2018 10:03 AM]
07/19/2018	MOTION to stay mandate, filed by Attorney Mr. Gavin R. Villareal for Appellant Food Marketing Institute w/service 07/19/2018. [4684120] [17-1346]--[Edited 07/19/2018 by MER] (GRV) [Entered: 07/19/2018 08:52 AM]

DATE	PROCEEDINGS
07/30/2018	RESPONSE in opposition to motion to stay the mandate [4684120-2] filed by Attorney Mr. Jon E. Arneson for Appellee Argus Leader Media, w/service 07/30/2018. [4687715] [17-1346] (JEA) [Entered: 07/30/2018 12:38 PM]
07/31/2018	REPLY to response [4687715-2] filed by Appellant Food Marketing Institute w/service 07/31/2018. [4688670] [17-1346] (GRV) [Entered: 07/31/2018 05:39 PM]
08/07/2018	JUDGE ORDER:Denying [4684120-2] motion to stay the mandate filed by Mr. Gavin R. Villareal for Appellant Food Marketing Institute. Hrg Mar 2018 [4690894] [17-1346] (MER) [Entered: 08/07/2018 11:15 AM]
08/07/2018	MANDATE ISSUED. [4690900] [17-1346] ***MANDATE RECALLED - SEE ORDER OF 08/29/2018***--[Edited 10/18/2018 by MER] (MER) [Entered: 08/07/2018 11:21 AM]

DATE	PROCEEDINGS
08/29/2018	SUPREME COURT order filed. The application to recall and stay the mandate, presented to Justice Gorsuch and by him referred to the Court, is granted, and the mandate of the United States Court of Appeals for the Eighth circuit in case No. 17-1346 is recalled and stayed pending the timely filed and disposition of a petition for a writ of certiorari. Should the petition for a writ of certiorari be denied, this stay shall terminate automatically. In the event the petition for a writ of certiorari is granted, the stay shall terminate upon the sending down of the judgment of this court. Justice Ginsburg, Justice Sotomayor, and Justice Kagan would deny the application. [4699372] [17-1346] (SRD) [Entered: 08/29/2018 11:56 AM]
08/29/2018	CLERK ORDER: Pursuant to the order of the U.S. Supreme Court, dated August 29, 2018, the mandate is hereby recalled and stayed pending the disposition of a petition for a writ of certiorari. [4699383] [17-1346] (SRD) [Entered: 08/29/2018 12:01 PM]
10/15/2018	U.S. Supreme Court Notice of cert filed in the Supreme Court on 10/11/2018, case No. 18-481 [4717214] [17-1346] (MER) [Entered: 10/18/2018 03:39 PM]

DATE	PROCEEDINGS
11/08/2018	RECORD RETURNED - EXHIBITS, Comments: 1 expandable folder of trial exhibits - see attached Exhibit List, *SENT -END OF CASE [4724228]* [17-1346] (JJF) [Entered: 11/08/2018 09:27 AM)

RELEVANT DOCKET ENTRIES

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION
No. 4:11-cv-04121-KES

Argus Leader Media v. United States Department of Agriculture

DATE	DOCKET NUMBER	PROCEEDINGS
08/26/2011	1	COMPLAINT filed by Argus Leader Media. (Attachments: # 1 Ex 1 - 2/1/11 Ellis ltr to Weatherly, # 2 Ex 2 - Undated ltr. from Weatherly to Ellis, # 3 Ex 3 - 2/25/11 ltr from Ellis to USDA)(DJP) (Entered: 08/26/2011)
03/15/2012	13	MOTION to Continue *Motion Deadline As to Exemption 4* by United States Department of Agriculture. (Attachments: # 1 Declaration of Jennifer Weatherly) (Bengford, Stephanie) (Entered: 03/15/2012)
03/15/2012	14	MEMORANDUM in Support re 13 MOTION to Continue *Motion Deadline As to Exemption 4* filed by United States

DATE	DOCKET NUMBER	PROCEEDINGS
		Department of Agriculture. (Bengford, Stephanie) (Entered: 03/15/2012)
03/15/2012	18	MOTION for Summary Judgment by United States Department of Agriculture. (Bengford, Stephanie) (Entered: 03/15/2012)
03/15/2012	19	AFFIDAVIT of Stephanie C. Bengford in Support re 18 MOTION for Summary Judgment filed by United States Department of Agriculture. (Bengford, Stephanie) Modified title on 3/16/2012 (CMS). (Entered: 03/15/2012)
03/15/2012	20	AFFIDAVIT of Susan Modine in Support re 18 MOTION for Summary Judgment filed by United States Department of Agriculture. (Bengford, Stephanie) Modified title on 3/16/2012 (CMS). (Entered: 03/15/2012)
03/15/2012	21	AFFIDAVIT of Andrea Gold in Support re 18 MOTION for Summary Judgment filed by United States Department of Agriculture. (Attachments: # 1 Exhibit) (Bengford, Stephanie) Modified title and exhibit on

DATE	DOCKET NUMBER	PROCEEDINGS
		3/16/2012 (CMS). (Entered: 03/15/2012)
03/15/2012	22	STATEMENT OF MATERIAL FACTS re 18 Motion for Summary Judgment by Defendant United States Department of Agriculture, Plaintiff Argus Leader Media filed by United States Department of Agriculture, Argus Leader Media. (Bengford, Stephanie) (Entered: 03/15/2012)
03/15/2012	23	MEMORANDUM in Support re 18 MOTION for Summary Judgment filed by United States Department of Agriculture. (Bengford, Stephanie) (Entered: 03/15/2012)
03/16/2012	25	AFFIDAVIT of Jennifer N. Weatherly re 18 MOTION for Summary Judgment. (Attachments: # 1 A: original request, # 2 B: request acknowledgement ltr, # 3 C: FW:FOIA request acknowledgement ltr, # 4 D: initial response, # 5 E: appeal response, # 6 F: Arnson ltr, # 7 G: Weatherly email)(Bengford, Stephanie) (Entered: 03/16/2012)

DATE	DOCKET NUMBER	PROCEEDINGS
04/12/2012	26	ORDER granting 13 Motion to Continue Briefing Deadline as to Exemption 4 for good cause shown. The court will consider Exemption 3 first and then schedule a new deadline regarding Exemption 4, if necessary. Signed by Chief Judge Karen E. Schreier on April 12, 2012. (Schreier, Karen) (Entered: 04/12/2012)
05/23/2012	33	MEMORANDUM in Opposition re 18 MOTION for Summary Judgment filed by Argus Leader Media. (Attachments: # 1 Exhibit A - 7 USC §2018, # 2 Exhibit B - 7 USC §278.1, # 3 Exhibit C - SNAP Application for Stores)(Arneson, Jon) Modified to identify exhibits on 5/24/2012 (CMS). (Entered: 05/23/2012)
05/23/2012	34	STATEMENT OF MATERIAL FACTS re 33 Memorandum in Opposition to Motion by Plaintiff Argus Leader Media filed by Argus Leader Media. (Attachments: # 1 Jon E. Arneson Declaration in Opposition to Defendant's Motion for Summary Judgment, # 2

DATE	DOCKET NUMBER	PROCEEDINGS
		Jonathan Ellis Declaration in Opposition to Defendant's Motion for Summary Judgment) (Arneson, Jon) Modified on 5/24/2012 (CMS). (Entered: 05/23/2012)
06/11/2012	35	REPLY to 23 Memorandum in Support of Motion, 18 Motion for Summary Judgment filed by United States Department of Agriculture. (Bengford, Stephanie) (Entered: 06/11/2012)
06/11/2012	36	DECLARATION of Susan Modine re 35 Reply. (Bengford, Stephanie) (Entered: 06/11/2012)
06/11/2012	37	DECLARATION of Jennifer Weatherly re 35 Reply. (Attachments: # 1 Exhibit 1 - Letter dated 08.05.2010, # 2 Exhibit 2 - response dated 08.31.2010)(Bengford, Stephanie) Modified on 6/12/2012 (CMS). (Entered: 06/11/2012)
09/27/2012	38	ORDER denying 12 Motion for Discovery; granting 18 Motion for Summary Judgment. Signed by Chief Judge Karen E.

DATE	DOCKET NUMBER	PROCEEDINGS
		Schreier on 9/27/2012. (KC) (Entered: 09/27/2012)
09/27/2012	39	JUDGMENT in favor of United States Department of Agriculture against Argus Leader Media. Signed by Chief Judge Karen E. Schreier on 9/27/2012. (KC) (Entered: 09/27/2012)
11/20/2012	40	NOTICE OF APPEAL as to 38 Order on Motion for Discovery, Order on Motion for Summary Judgment by Argus Leader Media. (Attachments: # 1 Supplement Form A) (Arneson, Jon) (Entered: 11/20/2012)
11/21/2012	42	USCA Case Number 12-3765 for 40 Notice of Appeal filed by Argus Leader Media. (CMS) (Entered: 11/21/2012)
01/28/2014	44	OPINION of USCA re: reversing and remanding for further proceedings consistent with this opinion as to 40 Notice of Appeal filed by Argus Leader Media (CMS) (Entered: 01/28/2014)
01/28/2014	45	JUDGMENT of USCA reversing and remanding for further proceedings consistent with opinion as to 40 Notice of Appeal

DATE	DOCKET NUMBER	PROCEEDINGS
		filed by Argus Leader Media (CMS) Modified on 1/28/2014 (CMS). (Entered: 01/28/2014)
03/25/2014	46	MANDATE from 8th Circuit COA reversing and remanding the decision of the District Court as to 40 Notice of Appeal filed by Argus Leader Media (TAL) (Entered: 03/27/2014)
01/20/2015	58	MOTION for Summary Judgment by United States Department of Agriculture. (Bengford, Stephanie) (Entered: 01/20/2015)
01/20/2015	59	DECLARATION of Andrea Gold re 58 MOTION for Summary Judgment. (Attachments: # 1 Ex. A - call transcript, # 2 Ex. B - email from FNS, # 3 Ex. C -declaration template, # 4 Ex. D1 - Barnes declaration, # 5 Ex. D2 - Bourne declaration, # 6 Ex. D3 - Buche declaration, # 7 Ex. D4 - Barbier declaration, # 8 Ex. D5 - Gresham declaration, # 9 Ex. D6 - Hays declaration, # 10 Ex. D7 - Champagne declaration, # 11 Ex. D8 - Forman declaration, # 12 Ex. D9 - LeBlanc declaration, # 13 Ex. D10

DATE	DOCKET NUMBER	PROCEEDINGS
		- Macks declaration, # 14 Ex. Dll - Larkin declaration, # 15 Ex. D12 - Snyder declaration, # 16 Ex. D13 - St. Germain declaration, # 17 Ex. D14 - Perret declaration, # 18 Ex. D15 - Zahar declaration, # 19 Ex. E - SNAP redemption chart, # 20 Ex. F FNS literature) (Bengford, Stephanie) (Entered: 01/20/2015)
01/20/2015	60	STATEMENT OF MATERIAL FACTS re 58 Motion for Summary Judgment by Defendant United States Department of Agriculture filed by United States Department of Agriculture. (Bengford, Stephanie) (Entered: 01/20/2015)
01/20/2015	61	MEMORANDUM in Support re 58 MOTION for Summary Judgment filed by United States Department of Agriculture. (Bengford, Stephanie) (Entered: 01/20/2015)

DATE	DOCKET NUMBER	PROCEEDINGS
02/03/2015	65	SUPPLEMENT by Defendant United States Department of Agriculture re 59 Declaration,,, . (Attachments: # 1 Exhibit Exhibit C - email & declaration template) (Bengford, Stephanie) (Entered: 02/03/2015)
04/01/2015	72	STATEMENT OF *Plaintiff's* MATERIAL FACTS re 58 Motion for Summary Judgment, 60 Statement of Material Facts by Plaintiff Argus Leader Media filed by Argus Leader Media. (Arneson, Jon) (Entered: 04/01/2015)
04/01/2015	73	MEMORANDUM in Opposition re 58 MOTION for Summary Judgment #2 filed by Argus Leader Media. (Attachments: # 1 Exhibit Ex. Order 12600, # 2 Exhibit 7 C.F.R. §1.12, # 3 Exhibit Retailer Notices, # 4 Exhibit Fed.Register "RFI", # 5 Exhibit USDA Press Release, # 6 Exhibit Arneson Declaration, # 7 Exhibit Ellis Declaration)(Arneson, Jon) (Entered: 04/01/2015)

DATE	DOCKET NUMBER	PROCEEDINGS
06/01/2015	77	REPLY to 58 Motion for Summary Judgment filed by United States Department of Agriculture. (Bengford, Stephanie) (Entered: 06/01/2015)
06/01/2015	78	DECLARATION of Andrea Gold re 58 MOTION for Summary Judgment (Attachments: # 1 Exhibit A - 78 Fed. Reg. 11,967, # 2 Exhibit B- 7 C.F.R. 271.2, # 3 Exhibit C - Megan Luther FOIA Request)(Bengford, Stephanie) (Entered: 06/01/2015)
06/01/2015	79	RESPONSE to 72 Statement of Material Facts filed by United States Department of Agriculture. (Bengford, Stephanie) (Entered: 06/01/2015)
09/30/2015	80	ORDER denying 58 Motion for Summary Judgment. Signed by U.S. District Judge Karen E. Schreier on 9/30/15. (DJP) (Entered: 09/30/2015)
04/20/2016	93	MOTION Expedited Motion for Court Order by United States Department of Agriculture. (Bengford, Stephanie) (Entered: 04/20/2016)

DATE	DOCKET NUMBER	PROCEEDINGS
04/20/2016	94	ORDER granting 93 Motion. Defendant has the burden of proof and will put its case-in-chief on first. Signed by U.S. District Judge Karen E. Schreier on April 20, 2016. (Schreier, Karen) (Entered: 04/20/2016)
05/11/2016	95	Pretrial Submissions by Argus Leader Media. (Attachments: # 1 Supplement) (Arneson, Jon) (Entered: 05/11/2016)
05/11/2016	96	Pretrial Submissions by United States Department of Agriculture.(Bengford, Stephanie) (Entered: 05/11/2016)
05/16/2016	99	STIPULATION *as to the Trial* by United States Department of Agriculture (Bengford, Stephanie) (Entered: 05/16/2016)
05/17/2016	101	MOTION for Protective Order by United States Department of Agriculture. (Attachments: # 1 Text of Proposed Order)(Bengford, Stephanie) (Entered: 05/17/2016)

DATE	DOCKET NUMBER	PROCEEDINGS
05/17/2016	102	MEMORANDUM in Support re 101 MOTION for Protective Order filed by United States Department of Agriculture. (Bengford, Stephanie) (Entered: 05/17/2016)
05/19/2016	103	Protective Order. Signed by U.S. District Judge Karen E. Schreier on 5/19/16. (DJP) (Entered: 05/19/2016)
05/19/2016	105	Pretrial Conference held on 5/19/2016 before U.S. District Judge Karen E. Schreier (Court Reporter Jill Connelly) (MWT) (Entered: 05/19/2016)
05/24/2016		Court Trial began on 5/24/2016 before U.S. District Judge Karen E. Schreier (Court Reporter Jill Connelly) (MWT) (Entered: 05/25/2016)
05/25/2016	111	Court Trial completed on 5/25/2016 before U.S. District Judge Karen E. Schreier (Court Reporter Jill Connelly) (MWT) (Entered: 05/25/2016)

DATE	DOCKET NUMBER	PROCEEDINGS
05/25/2016	112	Exhibit List by Argus Leader Media. Related document: 111 Court Trial - Completed. (MWT) (Entered: 05/25/2016)
05/25/2016	113	Exhibit List by United States Department of Agriculture. Related document: 111 Court Trial - Completed. (MWT) (Entered: 05/25/2016)
06/19/2016	118	PARTIAL TRANSCRIPT of Proceedings re 111 Court Trial - Testimony of Shelly Pierce and Andrea Gold - held on May 24 & 25, 2016 before Judge Karen E. Schreier. Court Reporter: Jill Connelly, Telephone number 605-330-6669. Transcript may be viewed at the Clerk's Office public terminal or purchased through the Court Reporter before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Redaction Request due 7/11/2016. Redacted Transcript Deadline set for 7/20/2016. Release of Transcript Restriction set for 9/19/2016. (Connelly, Jill) (Entered: 06/19/2016)

DATE	DOCKET NUMBER	PROCEEDINGS
06/19/2016	119	PARTIAL TRANSCRIPT of Proceedings re 111 Court Trial - Testimony of Andrew Johnstone - held on May 24, 2016 before Judge Karen E. Schreier. Court Reporter: Jill Connelly, Telephone number 605-330-6669. Transcript may be viewed at the Clerk's Office public terminal or purchased through the Court Reporter before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Redaction Request due 7/11/2016. Redacted Transcript Deadline set for 7/20/2016. Release of Transcript Restriction set for 9/19/2016. (Connelly, Jill) (Entered: 06/19/2016)
06/19/2016	120	NOTICE of Filing of Official Transcripts re 111 Court Trial - 2 PARTIAL TRANSCRIPTS. The Court Reporter shall manually serve a hard copy of this Notice on all non-ECF counsel. (Connelly, Jill) (Entered: 06/19/2016)

DATE	DOCKET NUMBER	PROCEEDINGS
06/22/2016	121	TRIAL BRIEF *(Post)* by United States Department of Agriculture.(Bengford, Stephanie) (Entered: 06/22/2016)
06/28/2016	122	PARTIAL TRANSCRIPT of Proceedings re 111 Court Trial - Closing Statements - held on 5-25-2016 before Judge Karen E. Schreier. Court Reporter: Jill Connelly, Telephone number 605-330-6669. Transcript may be viewed at the Clerk's Office public terminal or purchased through the Court Reporter before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Redaction Request due 7/19/2016. Redacted Transcript Deadline set for 7/29/2016. Release of Transcript Restriction set for 9/27/2016. (Connelly, Jill) Modified on 2/3/2017 to seal per 152 (SLW). (Entered: 06/28/2016)
06/28/2016	123	NOTICE of Filing of Official Transcript re 111 Court Trial - PARTIAL TRANSCRIPT - CLOSING STATEMENTS. The Court Reporter shall manually serve a hard copy of this

DATE	DOCKET NUMBER	PROCEEDINGS
		Notice on all non-ECF counsel. (Connelly, Jill) (Entered: 06/28/2016)
07/20/2016	124	BRIEF by Plaintiff Argus Leader Media *Post-Trial Responsive Brief* (Arneson, Jon) (Entered: 07/20/2016)
07/26/2016	125	REPLY to 124 Brief filed by United States Department of Agriculture. (Bengford, Stephanie) (Entered: 07/26/2016)
07/28/2016	126	RESPONSE to 125 Reply *Clarifications* filed by Argus Leader Media. (Arneson, Jon) (Entered: 07/28/2016)
11/30/2016	127	MEMORANDUM OPINION AND ORDER Signed by U.S. District Judge Karen E. Schreier on 11/30/16. (SLW) (Entered: 11/30/2016)
11/30/2016	128	JUDGMENT in favor of Argus Leader Media against United States Department of Agriculture. Signed by U.S. District Judge Karen E. Schreier on 11/30/16. (SLW) (Entered: 11/30/2016)

DATE	DOCKET NUMBER	PROCEEDINGS
01/27/2017	138	Emergency MOTION to Intervene, to Stay the Judgment, and for Extension of Time to File Notice of Appeal by Food Marketing Institute. (Fritz, Daniel) Modified on 1/30/2017 (DJP). (Entered: 01/27/2017)
01/27/2017	139	Memorandum in Support re 138 Emergency MOTION to Intervene *to Stay the Judgment and for Extension of Time to File Notice of Appal filed by Food Marketing Institute. (Attachments: # 1 Exhibit 1 (Declaration of Food Marketing Institute), # 2 Exhibit 2 (Declaration of H-E-B Grocery Company, L.P., # 3 Exhibit 3, (Declaration of National Grocers Association) # 4 Exhibit 4 (Declaration of David Mitchell)) (Fritz, Daniel) Modified on 1/30/2017 to add text (DJP). Modified text on 1/30/2017 (SLW). (Entered: 01/27/2017)*
01/30/2017	142	RESPONSE to Motion re 138 Emergency MOTION to Intervene *to Stay the Judgment and for Extension of Time to File Notice of Appeal filed by Argus Leader Media. (Attachments:*

DATE	DOCKET NUMBER	PROCEEDINGS
		# 1 Exhibit FMI declaration, # 2 Exhibit FMI RFI comment, # 3 Exhibit Answer to Interrogatory, # 4 Exhibit Production response, # 5 Exhibit Gold SJ declaration, # 6 Exhibit Larkin SJ declaration, # 7 Exhibit Larking declaration letter, # 8 Exhibit Larkin expert report, # 9 Exhibit FMI report 9-9-14, # 10 Exhibit FMI report 12¬2-14, # 11 Exhibit FMI report 12-16-14)(Arneson, Jon) (Entered: 01/30/2017)
01/30/2017	143	ORDER granting 138 FMIs motion to intervene. The court stays its judgment. FMI is required to post a $20,000 bond. The court also grants FMIs motion for a 15-day extension to file an appeal. Signed by U.S. District Judge Karen E. Schreier on 01/30/2017. (MWT) (Entered: 01/30/2017)
02/03/2017	147	BOND in the amount of $ $20,000 posted by Food Marketing Institute. Receipt #SDX400042442 (SLW) (Entered: 02/03/2017)

DATE	DOCKET NUMBER	PROCEEDINGS
02/07/2017	153	REDACTED Transcript re 122 Transcript. (Connelly, Jill) (Entered: 02/07/2017)
02/10/2017	154	EXPEDITED MOTION to Amend/Correct 103 *Protective Order* by United States Department of Agriculture. (Attachments: # 1 Text of Proposed Order)(Bengford, Stephanie) Modified on 2/13/2017 to add link and language (DJP). (Entered: 02/10/2017)
02/10/2017	155	MEMORANDUM in Support re 154 MOTION to Amend/Correct *Protective Order* filed by United States Department of Agriculture. (Bengford, Stephanie) (Entered: 02/10/2017)
02/13/2017	156	AMENDED PROTECTIVE ORDER granting 154 Motion to Amend/Correct. Signed by U.S. District Judge Karen E. Schreier on 2/13/17. (SLW) (Entered: 02/13/2017)

DATE	DOCKET NUMBER	PROCEEDINGS
02/14/2017	157	NOTICE OF APPEAL as to 128 Judgment by Food Marketing Institute. (paid $505 Appellate Filing fee; receipt number 0869-2449298) (Fritz, Daniel) (Entered: 02/14/2017)
02/15/2017	160	USCA Case Number for 157 Notice of Appeal filed by Food Marketing Institute. USCA Case Number: 17-1346. (TAL) (Additional attachment(s) added on 2/15/2017: # 1 Briefing Schedule) (TAL). (Entered: 02/15/2017)
06/18/2017	184	TRANSCRIPT of Proceedings re 105 Pretrial Conference held on May 19, 2016 before Judge Karen E. Schreier. Court Reporter: Jill Connelly, Telephone number 605-330-6669. Transcript may be viewed at the Clerk's Office public terminal or purchased through the Court Reporter before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Redaction Request due 7/10/2017. Redacted Transcript Deadline set for 7/19/2017. Release of Transcript Restriction

DATE	DOCKET NUMBER	PROCEEDINGS
		set for 9/18/2017. (Connelly, Jill) (Entered: 06/18/2017)
06/18/2017	185	TRANSCRIPT of Proceedings re 111 Court Trial held on May 24&25, 2016 before Judge Karen E. Schreier. Volume I of II. (Volume II is attached) Court Reporter: Jill Connelly, Telephone number 605-330-6669. Transcript may be viewed at the Clerk's Office public terminal or purchased through the Court Reporter before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Redaction Request due 7/10/2017. Redacted Transcript Deadline set for 7/19/2017. Release of Transcript Restriction set for 9/18/2017. (Attachments: #1 Volume II of II) (Connelly, Jill) (Entered: 06/18/2017)
06/18/2017	186	REDACTED Transcript re 185 Transcript, Court Trial, Vol. II of II, held on May 25, 2016. (Connelly, Jill) (Entered 06/18/2017)

DATE	DOCKET NUMBER	PROCEEDINGS
06/18/2017	187	SEALED PARTIAL TRANSCRIPT of Proceedings re 111 Sealed rebuttal testimony of Gwen Forman during the Court Trial held on 5-25-2016 before Judge Karen E. Schreier. Court Reporter: Jill Connelly, Telephone number 605-330-6669. Transcript may be viewed at the Clerk's Office public terminal or purchased through the Court Reporter before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Redaction Request due 7/10/2017. Redacted Transcript Deadline set for 7/19/2017. Release of Transcript Restriction set for 9/18/2017. (Connelly, Jill) (Entered: 06/18/2017)
06/18/2017	188	NOTICE of Filing of Official Transcript re 111 Court Trial - Completed, 105 Pretrial Conference. The Court Reporter shall manually serve a hard copy of this Notice on all non-ECF counsel. (Connelly, Jill) (Entered: 06/18/2017)

DATE	DOCKET NUMBER	PROCEEDINGS
06/20/2017	190	MOTION Access to Sealed Doc 187 and Unredacted Doc 185 by Food Marketing Institute. (Fritz, Daniel) (Entered: 06/20/2017)
07/07/2017	191	ORDER granting 190 Motion of FMI for access to sealed partial transcript of proceedings (docket 187) and unredacted transcript of proceedings (docket 185), for good cause shown and no objections filed by other parties. Signed by U.S. District Judge Karen E. Schreier on July 7, 2017. (Schreier, Karen) (Entered: 07/07/2017)
05/08/2018	197	OPINION of USCA as to 157 Notice of Appeal filed by Food Marketing Institute. (TAL) (Entered: 05/08/2018)
05/08/2018	198	JUDGMENT of USCA affirming the district court judgment as to 157 Notice of Appeal filed by Food Marketing Institute. (TAL) (Entered: 05/08/2018)
06/04/2018	199	ORDER of USCA remanding to the district court with instructions to determine the

DATE	DOCKET NUMBER	PROCEEDINGS
		availability of attorney's fees pursuant to 5 U.S.C. § 552, and to enter judgment accordingly as to 157 Notice of Appeal filed by Food Marketing Institute. (SAC) (Entered: 06/04/2018)
07/13/2018	200	ORDER of USCA denying petitions for rehearing enbanc and rehearing by panel as to 157 Notice of Appeal filed by Food Marketing Institute. (TAL) (Entered: 07/13/2018)
08/07/2018	201	ORDER of USCA denying motion to stay mandate as to 157 Notice of Appeal filed by Food Marketing Institute. (TAL) (Entered: 08/07/2018)
08/07/2018	202	(RECALLED) MANDATE from 8th Circuit COA Affirming the decision of the District Court as to 157 Notice of Appeal filed by Food Marketing Institute. (TAL) Modified on 8/29/2018 (TAL). (Entered: 08/07/2018)

DATE	DOCKET NUMBER	PROCEEDINGS
08/29/2018	203	ORDER of Supreme Court granting application to recall and stay the mandate as to 157 Notice of Appeal filed by Food Marketing Institute. (TAL) (Entered: 08/29/2018)
08/29/2018	204	ORDER of USCA recalling mandate as to 157 Notice of Appeal filed by Food Marketing Institute. (TAL) (Entered: 08/29/2018)
10/18/2018	205	LETTER from USCA regarding Writ Of Certiorari re 157 Notice of Appeal filed by Food Marketing Institute. (TAL) (Entered: 10/19/2018)
11/13/2018	206	Appeal Record Returned: Jury Trial exhibits returned to Sioux Falls Clerk's Vault. (SLW) (Entered: 11/13/2018)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

CIV. 11-4121

(Filed 08/26/11)

ARGUS LEADER MEDIA, dba *Argus Leader*,
Plaintiff,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE
Defendant.

COMPLAINT

Plaintiff, Argus Leader Media [*Argus Leader*], for its Complaint, states as follows:

JURISDICTION AND VENUE

1. This action arises under and pursuant to the Freedom of Information Act, 5 U.S.C. §552, to order the production of agency records concerning the identity of businesses that receive federal food stamp revenue under the auspices of the United States Department of

Agriculture [USDA]. These records have been improperly held from the plaintiff.

2. This court has jurisdiction over this action pursuant to 5 U.S.C. §552 (a)(4)(B).

3. Venue is proper in this district under 5 U.S.C. §552 (a)(4)(B).

THE PARTIES

4. *Argus Leader* is a newspaper published in Sioux Falls, South Dakota, and has a principal place of business at 200 South Minnesota Avenue, Sioux Falls, South Dakota.

5. Defendant is the Secretary of the Department of Agriculture, the Department of Agriculture being the agency withholding the record sought under the Freedom of Information Act.

FACTS

6. By letter dated February 1, 2011, Plaintiff requested access to data stored on USDA's Food Nutrition Service's STARS database. The requested records pertaining to stores [vendors] in the United States that redeemed food stamps from 2005 through 2010 were: a) store identifiers [unique ID number]; store names; store addresses; store types; annual redemption amounts

or EBT [electronic benefit transfer] sales figures for each store. A copy of this letter is attached hereto and incorporated herein as Exhibit 1.

7. By undated letter received February 17, 2011, Plaintiff agreed to release store names and addresses, but furnished an incomplete list. The Defendant's letter went on to deny Plaintiff access to all other requested information on the ground that it was exempt from disclosure under 5 U.S.C. §552 (b)(3) and (b)(4). A copy of this letter is attached hereto and incorporated herein as Exhibit 2.

8. By letter dated February 25, 2011, Plaintiff appealed the denial of this request. A copy of this letter is attached hereto and incorporated herein as Exhibit 3.

9. An official agency response to the letter of appeal has not been received from the Department of Agriculture or its officers or attorneys.

10. The USDA's "unofficial" position was sent by email on July, 2011, and contained the following claims:

> [The *Argus Leader*] requested for Store Identifier and Store Type which we withheld. Store type is one of the identifiers designated to each authorized retailer by FNS. CFR 278.1(3)(iv) indicates that the SSNs and related records that are obtained or maintained by authorized persons are confidential

> . . . . The term "related record" means any record, list, or compilation that indicates, directly or indirectly, the identity of any individual with respect to whom a request for a SSN is maintained. Store identifiers or unique identification numbers would be included in the category of "related records."
>
> [The *Argus Leader*] also requested for EBT redemption data which we withheld. Again from CFR 278.1 we are not allowed to release this information unless it is for the purpose directly connected with the administration and enforcement of the Food Stamp Act. . . .

11. Plaintiff has a right of access to the requested information under 5 U.S.C. 552 (a)(3) and there is no legal basis for Defendant's denial of such access.

WHEREFORE, Plaintiff prays:

1. That this Court order Defendant to provide immediate access to the requested documents and information;

2. Award Plaintiff its costs and reasonable attorney fees in this action as provided under 5 U.S.C. §552(a)(4)(E);

3. Grant such other relief as the Court may deem just and proper.

DATED this 26th[th] day of August, 2011.

/s/ Jon E. Arneson

JON E. ARNESON, SD. Bar #45
123 South Main Avenue, Ste. 202
Sioux Falls, South Dakota 57104
Telephone: (605) 335-0083
Facsimile: (605) 335-0083
Attorney for Plaintiff

EXHIBIT 1

Argus Leader
200 S. Minnesota Avenue
PO Box 5034
Sioux Falls, SD 57117-5034
(605) 331-2300
Fax: (605) 331-2294

Feb. 1, 2011

Jennifer Weatherly
FNS FOIA Officer
USDA Food and Nutrition Service
3010 Park Center Dr.
Alexandria, VA 22302

Dear Ms. Weatherly:

This is a request under the Freedom of Information Act.

Please send me the following data from the FNS STARS database for fiscal years 2005 through 2010:

- Store identifier, or unique ID number
- Store name
- Store address
- Store type
- The yearly redemption amounts, or EBT sales figures, for each store.

I am a member of the media and ask that you waive all fees for this request because disclosure of this information is in the public interest. If you decide to charge fees, please contact me first.

If you deny my request in whole or in part, I ask that you cite the specific exemptions under FOIA that you used to justify your decision.

Thank you for your help in this matter. Please feel free to contact me with any questions.

Sincerely,

Jonathan Ellis
Argus Leader
605-575-3629
JonEllis@ArgusLeader.com

EXHIBIT 2

USDA

**United States
Department of
Agriculture**

Food and
Nutrition
Service

3101 Park Center Dr
Alexandria, VA
22302-1500

Mr. Jonathan Ellis
Argus Leader
200 S. Minnesota Avenue
PO Box 5034
Sioux Falls, SD 57117-5034

Dear Mr. Ellis:

This is in response to the Freedom of Information Act (FOIA) request to this office for the following information:

Data from the FNS STARS database for fiscal years 2005 through 2010:

- Store identifier, or unique ID number
- Store name
- Store address

- Store type
- The yearly redemption amounts, or EBT sales figures, for each store.

In response to your request, we are releasing the store names and addresses during the period you requested. The Food and Nutrition Act at 7 U.S.C. 2018 (9)(c) and Title 7, Part 278 of Federal regulations at 278.1 (q) are specific with regard to information sharing. Therefore, all other information is being withheld under 5 U.S.C. 552 (b)(3) and (b)(4).

If you are dissatisfied with our response to your FOIA request, you may appeal by writing to the Administrator, Food and Nutrition Service at 3101 Park Center Drive, Alexandria, VA 22302 or by email to FOIA@fns.usda.gov within 45 days from the date of this letter. The phrase "FOIA APPEAL" should be placed in capital letters on the front of the envelope or in the subject of the email containing the appeal.

Sincerely,

/s/ Jennifer Weatherly

Jennifer Weatherly
FNS FOIA Officer
USDA Food and Nutrition Service

AN EQUAL OPPORTUNITY EMPLOYER

EXHIBIT 3

Argus Leader
200 S. Minnesota Avenue
PO Box 5034
Sioux Falls, SD 57117-5034
(605) 331-2300
Fax: (605) 331-2294

Feb. 25, 2011

Administrator
USDA Food and Nutrition Serv
3010 Park Center Dr.
Alexandria, VA 22302

RE: FOIA APPEAL

Dear Sir or Madam:

This is an appeal of a Freedom of Information Act request that was denied on Feb. 17, 2011.

We requested the following data from the FNS STARS database for fiscal years 2005 through 2010:

- Store identifier, or unique ID number
- Store name
- Store address
- Store type
- The yearly redemption amounts, or EBT sales figures, for each store.

Your office provided only a partial, incomplete list of the store names and addresses. In addition, your office wrongly denied releasing the other information based on a misreading of the Food and Nutrition Act, 7 U.S.C. 2018 (9)(c) and Title 7, Part 278 of Federal regulations at 278.1 (q). Based upon this, your office inappropriately applied FOIA exemptions (b)(3) and (b)(4) in denying the request for public information.

FOIA exemption (b)(3) applies to information exempt from disclosure by statute. The Food and Nutrition Act explicitly exempts from disclosure "relevant income and sales tax filing documents." No part of our denied request included tax filings, or for that matter, information that would have been included in tax filings, which is information submitted by businesses when they apply to participate in the Supplemental Nutrition Assistance Program.

FOIA exemption (b4) relates specifically to trade secrets and financial information obtained from businesses. Businesses that apply to participate in the Supplemental Nutrition Assistance Program are required to submit an array of information, including actual or expected gross sales. The *Argus Leader's* FOIA request did not ask for gross sales. Instead, the request asked for the amounts that each business received from taxpayers during the calendar years 2005 – 2010 by participating in the SNAP program. That is not information provided by the business; it is public information kept by the department.

Similarly, store identifiers or unique ID numbers and store types are not information provided by businesses, but instead it is information created by the department. Title 7, Part 278 at 278.1 (q) relates

specifically to the "Use and disclosure of information provided by firms." None of the information your department denied in our FOIA request was provided by a business.

The department routinely releases similar information in other programs. For example, the amounts farmers receive in agriculture subsidies are publicly available. It should be no different for businesses that participate in the Supplemental Nutrition Assistance Program.

Taxpayers have a right to know who receives their money and how much they get for providing services on behalf of the government. The release of this information is clearly in the public's interest.

We look forward to the release of the information we requested in this appeal. In addition, we ask that you waive any fees because disclosure is in the public's interest.

Thank you for your help in this matter. Please feel free to contact me with any questions.

Sincerely,

Jonathan Ellis
Argus Leader
605-575-3629
JonEllis@ArgusLeader.com

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

1:11-CIV-4121-KES

(Filed 03/15/12)

ARGUS LEADER MEDIA, dba *ARGUS LEADER*,
Plaintiff,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE,
Defendant.

DECLARATION OF SUSAN MODINE IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

I, Susan Modine, declare as follows:

1. I am a Program Analyst within the Retailer Operations Branch of the Benefit Redemption Division, Food and Nutrition Service (FNS), United States Department of Agriculture. I am responsible for providing technical assistance on retailer management/tracking systems; assisting national, regional, and field office staff with data analysis and

reporting; researching data-related issues; evaluating the administration and operation of programs; and assisting in resolution of issues impacting the Supplemental Nutrition Assistance Program integrity. I have served in this position since December 2008.

* * *

9. SNAP recipients electronically receive SNAP benefits on an EBT card, which operates like a debit card, to buy eligible food at stores authorized by the Food and Nutrition Service. In order to complete a transaction, the customer swipes the card in a point-of-sale device (POS) and enters a four digit personal identification number (PIN). The store clerk enters the exact amount of the purchase on the POS device. This amount is deducted from the household's EBT SNAP account and it is credited within two banking days to the retailer's bank account. This credit to the retailer's bank account is what we refer to as redemptions.

* * *

Pursuant to 28 U.S.C. § 1746, I hereby declare under penalty of perjury that the foregoing is true and correct based on information and belief.

Dated: 3/14/12

/s/ Susan Modine

Susan Modine
Program Analyst
Retailer Operations Branch of the Benefit Redemption Division
Food and Nutrition Service
United States Department of Agriculture

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

1:11-CIV-4121-KES

(Filed 03/15/12)

ARGUS LEADER MEDIA, dba *ARGUS LEADER*,

Plaintiff,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE,

Defendant.

DEFENDANT'S STATEMENT OF MATERIAL FACTS IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

The defendant, by and through its attorneys, United States Attorney Brendan V. Johnson and Assistant United States Attorney Stephanie C. Bengford, hereby submits this statement of material facts in support of its motion for summary judgment.

* * *

90. Participating retailers receive their point-of-sale (POS) device from either the state's EBT vendor or from a third party processor. Gold Decl. ¶19.

91. State provided EBT POS equipment processes only SNAP and may process state cash programs, as well [e.g. Temporary Assistance for Needy Families (TANF)]. Gold Decl. ¶19.

92. Third party POS equipment also processes commercial debit and credit card transactions. Gold Decl. ¶19.

93. There are three primary EBT vendors nationally that are under contract with each state to handle SNAP EBT issuance. Gold Decl. ¶20.

* * *

96. State EBT vendors handle and track the client SNAP benefit accounts, process the SNAP EBT transactions and facilitate payments to the participating retail firms. Gold Decl. ¶20.

* * *

100. SNAP redemption data is reviewed to monitor compliance and excessive redemptions may be indicative of violations and a reason for a retail store to be sanctioned. Gold Decl. ¶21.

* * *

Dated this 15th day of March, 2012.

BRENDAN V. JOHNSON
United States Attorney

/s/ Stephanie Bengford

STEPHANIE C. BENGFORD
Assistant U.S. Attorney
PO Box 2638
Sioux Falls, SD 57101-2638
Phone: 605.357.2341
Fax: 605.330.4402
Stephanie.bengford@usdoj.gov

CERTIFICATE OF SERVICE

I, Stephanie C. Bengford, do hereby certify that on March 15, 2012, I caused copies of the foregoing to be served upon the following:

)

Jon E. Arneson

- ○ US mail
- ○ FedEx
- • ECF
- ○ hand delivered
- ○ faxed

/s/ Stephanie Bengford

Stephanie C. Bengford

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

1:11-CIV-4121-KES

(Filed 03/15/12)

ARGUS LEADER MEDIA, dba *ARGUS LEADER*,

Plaintiff,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE,

Defendant.

DECLARATION OF JENNIFER N. WEATHERLY IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

I, Jennifer N. Weatherly, declare as follows:

1. I am the Freedom of Information Act (FOIA) officer for the Food and Nutrition Service (FNS), which is an agency of the United States Department of Agriculture (USDA). I have served in this position since November 9, 2009.

2. In my capacity as FOIA officer, my responsibilities include managing all FOIA requests made to FNS under the FOIA, 5 U.S.C. § 552 (2006), *amended by* OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524. I am responsible for ensuring that all FOIA and Privacy Act requests made to FNS are processed appropriately. My duties include initiating searches relevant to such requests and determining whether records or information must be disclosed or withheld.

* * *

Background

* * *

5. Benefit Redemption Division (BRD), a component within FNS, is responsible for all aspects of retailer management and operations for the Supplemental Nutrition Assistance Program (SNAP). In addition, BRD is responsible for the Electronic Benefit Transfer (EBT) system used by recipients through retailers. BRD ensures that only legitimate retailers, who offer a variety of food items, participate in SNAP and that those stores not in compliance with regulations and policies are sanctioned appropriately. BRD also ensures that the EBT

system is responsive to the needs of clients, state, and federal government.

6. The information at issue in plaintiff's request is maintained within an information technology system overseen by BRD. This system is referred to as the Store Tracking and Redemption System (STARS). The STARS system consists of personal information from owners and officers of stores and other entities currently participating in SNAP, as well as those owners and officers who have previously participated in the program. The individual paper records (i.e., applications for authorization) are located in FNS field offices. This database also maintains, but is not limited to, the following business information: corporation name and address, employer identification number (EIN), and financial data (i.e., food sales, gross sales, and SNAP redemption data) relative to each entity that applied and/or was authorized to accept program benefits.

* * *

Pursuant to 28 U.S.C. § 1746, I hereby declare under penalty of perjury that the foregoing is true and correct based on information and belief.

Dated: March 14, 2012

/s/ Jennifer Weatherly
Jennifer Weatherly
FOIA Officer
USDA, Food and Nutrition Service

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

1:11-CIV-4121-KES

(Filed 03/15/12)

ARGUS LEADER MEDIA, dba *ARGUS LEADER*,

Plaintiff,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE,

Defendant.

DECLARATION OF ANDREA GOLD IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

I, Andrea Gold, declare as follows:

1. I am the Benefit Redemption Division Director for the Supplemental Nutrition Assistance Program (SNAP). SNAP is part of the Food and Nutrition Service (FNS), an agency of the United States Department of Agriculture (USDA). I have served in this position since December 2010.

2. In my current position, I am responsible for national SNAP retailer management policies and oversight activities. I am also responsible for national SNAP benefit issuance policies and Electronic Benefit Transfer (EBT) related activities.

* * *

8. The FNS number is a unique retailer identification number. Without a valid FNS number, a SNAP payment cannot be authorized. The FNS number is also used to track store redemption of SNAP benefits. These items are explained in further detail below.

* * *

19. Participating retailers receive their point-of-sale (POS) device from either the state's EBT vendor or from a third party processor. State provided EBT POS equipment processes only SNAP and may process state cash programs, as well [e.g. Temporary Assistance for Needy Families (TANF)]. Third party POS equipment also processes commercial debit and credit card transactions.

20. There are three primary EBT vendors nationally that are under contract with each state to handle SNAP EBT issuance. The EBT vendors may sub-contract the management of retailer POS. In other words, the primary

EBT vendors may contract out to subcontractors the ability to provide the point of sale devices to authorized retail firms. State SNAP EBT vendors or state card issuers provide the EBT cards to participating SNAP clients. State EBT vendors handle and track the client SNAP benefit accounts, process the SNAP EBT transactions and facilitate payments to the participating retail firms. The EBT vendors send FNS files of all SNAP transactions by FNS number. Aggregated SNAP redemptions for each retail firm are loaded into our STARS database. This becomes the agency's official record of SNAP redemptions by retail firm. Participating retail firms receive payment for SNAP transactions via direct deposits into the bank account of record.

* * *

Pursuant to 28 U.S.C. § 1746, I hereby declare under penalty of perjury that the foregoing is true and correct based on information and belief.

Dated March 15, 2012.

/s/ Andrea Gold
Andrea Gold
Benefit Redemption Division Director
Supplemental Nutrition
Assistance Program
United States Department of Agriculture

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

1:11-CIV-4121-KES

(Filed 01/20/15)

ARGUS LEADER MEDIA, dba *ARGUS LEADER*,

Plaintiff,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE,

Defendant.

DECLARATION OF ANDREA GOLD IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

I, Andrea Gold, declare as follows:

1. I am the Retailer Policy and Management (formerly Benefit Redemption) Division Director for the Supplemental Nutrition Assistance Program (SNAP). SNAP is part of the Food and Nutrition Service (FNS), an agency of the United States Department of Agriculture

(USDA). I have served in this position since December 2010.

2. In my current position, I am responsible for national SNAP retailer management policies and oversight activities. I am also responsible for national SNAP benefit issuance policies and Electronic Benefit Transfer (EBT) related activities.

* * *

21. Further, FNS considered whether the redemption information at issue meets the requirement of "obtained from a person." FNS understands that "person" has been broadly defined to include individuals and businesses. In the simplest terms, SNAP redemption information is generated when the SNAP client swipes his or her Electronic Benefits Transfer (EBT) card at the SNAP retail food store and that information is transmitted to the State-contracted, private EBT processor, which then transmits the information to FNS. In accordance with 7 CFR 274.8(a)(3), the State-contracted, private EBT processor is responsible for sending to FNS the files of all SNAP transactions. There are three primary EBT processors nationally that are under contract with each state: Xerox, FIS, and JP

Morgan Chase. *See* SNAP REDEMPTION CHART, **Exhibit E**. Retailers may choose to enter into a contract with a private third-party processor, which acts as an agent of the retailer in transmitting SNAP transaction data to the EBT processor and in transmitting SNAP funds to the retailer's bank account. Third-party processors are private, commercial entities that provide credit/debit/EBT card processing services to retailers.

22. In order to participate in SNAP a retailer must apply to FNS. If eligible, FNS will authorize the retailer. All SNAP households are issued EBT cards in order to purchase food at retailers; therefore, in order to allow SNAP households to use EBT cards to purchase food at their stores, authorized retailers must be able to accept EBT transactions. In order to accept EBT transactions, an authorized retailer oftentimes enters into a contract with a third-party processor, a private, commercial credit/debit/ EBT card processor. Third-party processors provide Point of Sale (POS) devices to retailers, in addition to routing SNAP transactions to the appropriate State-contracted, private EBT processor for approval and transmitting SNAP funds to the retailer's bank account. If a retailer does not want to accept credit/debit cards it

may instead opt to contract directly with the EBT processor for POS and EBT services. SNAP redemption data is generated only when an approved SNAP transaction occurs at the authorized retailer's POS device. An EBT card is swiped at a POS terminal, and the completed electronic transaction is transmitted to the EBT processor, either via the retailer's third-party processor or directly from the retailer. The EBT processor then verifies relevant information, such as whether the EBT card and the Personal Identification Number (PIN) used are valid and whether there are sufficient funds in the SNAP household's account, before approving the transaction and adjusting the SNAP household's account on the household's EBT card to reflect the transaction. Each day the EBT processor reconciles and tallies the total amount of SNAP benefits accepted by retailers. The EBT processor credits that amount to the bank accounts of each third-party processor and directly connected retailer through the Automated Clearing House (ACH) network. The EBT processor subsequently submits a request to the Federal Reserve Bank where each State has a funded letter-of-credit for reimbursement for those funds through this same ACH

process or by direct wire. Each day the third-party processor also calculates the amount owed to each of its retailers for all credit, debit and EBT transactions and uses the ACH process to credit the retailer's bank account. Electronic EBT transaction approval requests sent to the EBT processor, as described earlier, contain dozens of data fields, including date, time, transaction type and dollar amount. It is the dollar amount of the transaction which is referred to as SNAP redemption amount and it is these individual dollar amounts that are compiled by the EBT processor and transmitted into the STARS database on a weekly basis. The EBT processor records all of this data for both the SNAP household and the retailer. In accordance with 7 CFR 274.8(a)(3), the EBT processor transmits a subset of this data to FNS, where it is aggregated, tracked, and analyzed in order to ensure program integrity and to investigate and sanction SNAP retailers who commit fraud. For example, knowledge of whether a store is redeeming assists FNS in ensuring that stores that have been closed or sold are removed from the Program (i.e. non-redeeming stores are periodically contacted to determine their status and purged if closed or under new ownership). This also allows FNS to provide

the most up to date list of operating SNAP authorized locations to the public via the SNAP Retailer Locator. Additionally, this knowledge allows FNS to focus staff resources for store reauthorization and compliance monitoring activities on stores that are open and operational.

23. As part of the SNAP retailer authorization process, the retailer is advised that SNAP redemption data will be recorded the by the EBT processors and shared with FNS. This is noted in SNAP regulations at 7 CFR 274.8(a)(3), which requires that the EBT processor record SNAP redemption data and transmit that information to FNS, and in FNS literature that newly-authorized SNAP retailers receive from FNS. **Exhibit F** (FNS literature). Furthermore, this requirement to send SNAP redemption data to FNS is reiterated in contracts between the EBT processor and State. A typical contract between the EBT processor and State includes the following language:

> The Contractor will provide batch interface files required by the U.S. Department of Agriculture, Food & Nutrition Service (FNS), including at a minimum:

• Account Management Agent (AMA), daily batch update

Each business day, the Contractor must provide data necessary to support increases/decreases to the project's Treasury Department's Automated Standard Application for Payments (ASAP) account balance to the Federal Reserve Bank of Richmond. The Federal Reserve Bank will serve as the Account Management Agent (AMA) for the FNS Supplemental Nutrition Assistance Program EBT benefit account. The AMA will interface with the ASAP account, and will establish ASAP account funding limits for the State for SNAP EBT activity. Consequently, it will be necessary for the Contractor to interface with the AMA and provide the necessary data.

• Store Tracking and Redemptions Subsystem (STARS), weekly file transmission

On a weekly basis, the Contractor shall provide detailed net daily SNAP redemption data by retailer identification number to the Store Tracking and Redemptions Subsystem (STARS) system, the FNS SNAP redemption database, through the Benefit Redemption Systems Branch (BRSB) in Minneapolis. STARS provides data to FNS field offices, area offices, regional offices and the national office to monitor compliance with regulations by retailers, Federal Reserve Bank member institutions, and EBT contractors that participate in the Supplemental Nutrition Assistance Program.

Therefore, a retailer who refuses to have its SNAP redemption information submitted to FNS would not be able to accept EBT cards and would be unable to participate as a SNAP retailer. In summary, redemption data is generated at the store-level, the generation and submission of this data has been authorized by the retailer, and the transmission of this data is required by FNS.

24. Transmission files from EBT processors to STARS are received and processed by the FNS SNAP STARS contractor. Each State-contracted, private EBT processor electronically sends one file per State that contains the daily total SNAP redemption data for the State's EBT cards that were used at each store. STARS does not receive individual transaction data. Once each transmission file is received, it is then posted to STARS as redemption data for each SNAP retailer. Once all the files from each State's EBT processor for the entire month are received by the FNS SNAP STARS contractor, the Average Monthly Redemptions is calculated in STARS for each SNAP retailer. This is the monthly average of the total redemptions for the last 12 full months for each SNAP retailer and this monthly average is used to

calculate the appropriate civil penalties for SNAP retailers who commit fraud. For purposes of calculating the end-of-the-year Average Monthly Redemptions, STARS aggregates the January through December monthly SNAP redemption amounts for each retailer to produce the yearly SNAP redemption data for each SNAP retailer.

* * *

26. Upon review of the responses provided the Agency has determined that FOIA exemption 4 applies relative to the release of the 2005-2010 SNAP redemptions. The Agency therefore declined to release retailer redemption information for the period requested by Argus. Based on the comments received from the RFI and additional information submitted by retailers and trade groups, the Agency has determined that annual store-level SNAP redemption information is confidential or privileged commercial or financial information that is obtained from a person.

27. In addition, the Agency has had a long-standing policy regarding treatment of this data as confidential under 7 C.F.R. § 278.1(q). As retailers participating during the period for which data has been requested did

so under the expectation that such data would be protected, and because they are unable to opt out retrospectively, this data will not be released.

Pursuant to 28 U.S.C. § 1746, I hereby declare under penalty of perjury that the foregoing is true and correct based on information and belief.

Dated January 20, 2015.

/s/ Andrea Gold
Andrea Gold
Retailer Policy and Management
Division Director
Supplemental Nutrition Assistance
Program
Food and Nutrition Service
United States Department of Agriculture

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

Civ. 11-4121

ARGUS LEADER MEDIA, dba ARGUS LEADER,

Plaintiff,

vs.

UNITED STATES DEPARTMENT OF AGRICULTURE,

Defendant.

Excerpts from Transcript of Court Trial held May 24-25, 2016, before the Honorable Karen E. Schreier, U.S. District Court Judge, at the U.S. District Courthouse in Sioux Falls, South Dakota

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APPEARANCES:

MR. JON E. ARNESON, Attorney at Law, 123 S. Main Avenue, Suite 202, Sioux Falls, South Dakota 57104, appearing on behalf of the Plaintiff.

MS. STEPHANIE C. BENGFORD, U.S. Attorney's Office, P.O. Box 2638, Sioux Falls, South Dakota 57101-2638, appearing on behalf of the Defendant.

MR. DAVID K. GASTON and MS. CHU-YUAN HWANG, U.S. Department of Agriculture, 1400 Independence Avenue, S.W., Room 3311, Washington, DC 20250, appearing on behalf of the Defendant.

* * *

[10] SHELLY PIERCE, called as a witness, being first duly sworn, testified as follows:

DIRECT EXAMINATION

MS. HWANG: Good morning, Miss Pierce. Miss Pierce, can you please state your full name for the record.

MS. PIERCE: Shelly Ann Pierce.

* * *

[11] MS. HWANG: And where do you work, Miss Pierce?

MS. PIERCE: At the United States Department of Agriculture, Food and Nutrition Service, Supplemental Nutrition Assistance Program.

* * *

MS. HWANG: Thank you. What is your position at the United States Department of Agriculture, USDA; Food and Nutrition Service, FNS; Supplemental Nutrition Assistance Program, SNAP?

MS. PIERCE: I am the Branch Chief for the Retailer Administration Branch.

* * *

MS. HWANG: What are your job responsibilities in that position?

MS. PIERCE: My staff is responsible for the systems and data used as part of SNAP Retailer Management.

MS. HWANG: And what are your job responsibilities -- I'm sorry.

So what are the systems that are used in Retailer Management, Miss Pierce?

[12] MS. PIERCE: The Store Tracking and Redemption System, or STARS; the Anti-Fraud Locator using EBT Retailer Transactions, or ALERT; the Online

Store Application; the Online Reauthorization Application; and the SNAP Retailer Locator.

* * *

[13] MS. HWANG: To your knowledge, what is the information at dispute in this current lawsuit brought by Argus Leader?

MS. PIERCE: SNAP retailer redemption data.

MS. HWANG: What is the level of SNAP redemption data that Argus has requested?

MS. PIERCE: Individual retailer redemptions.

MS. HWANG: Do you recall, is there a time frame to Argus Leader's request?

MS. PIERCE: January of 2005 through December of 2010.

MS. HWANG: And how would you describe SNAP redemption information?

MS. PIERCE: It's the net amount redeemed at each retailer location on a particular day.

MS. HWANG: When you say "redeemed," what do you mean?

MS. PIERCE: The amount of SNAP benefits that were transacted at that store.

[14] MS. HWANG: Thank you. Where is such information located at FNS?

MS. PIERCE: We load it into the STARS System.

* * *

MS. HWANG: Your Honor, may I approach the witness with Government's Exhibit 201.

THE COURT: Yes. * * *

* * *

MS. HWANG: Miss Pierce, can you please confirm that I have handed you two documents?

MS. PIERCE: That's correct.

MS. HWANG: And can you confirm that these two documents are identical except for the exhibit number?

MS. PIERCE: That's correct.

MS. HWANG: So I'll ask that you focus on the one without the exhibit number, and you can mark on that as we go along.

Do you recognize this document, Miss Pierce?

MS. PIERCE: Yes.

MS. HWANG: What is this document?

MS. PIERCE: It is a flow chart showing how SNAP transaction [15] and redemption data flow through the system and showing how retailers are paid.

MS. HWANG: Please help me understand how SNAP redemption information, which we were just talking about, gets to the STARS System.

Looking at the exhibit in front of you, can you explain how SNAP redemption information flows into STARS, starting with the SNAP client household swiping his EBT card?

MS. PIERCE: Sure. The SNAP client household would swipe their EBT, or electronic benefits transfer, card at the point-of-sale device at a retailer location. They would enter their four-digit personal identification number, and the retailer clerk would enter the total amount of the purchase.

Most retailers contract with a third party, we call them third-party processors, to provide their point-of-sale equipment and provide transaction processing services to them.

So that entity would pass the information along to the EBT processor, who would validate that the retailer is authorized to participate in the SNAP Program, that the four-digit PIN entered by the client was correct, and that there were enough benefits in the client's account to cover the transaction.

[16] The EBT processor would then send a response through the third-party processor back to the retailer indicating whether the transaction was approved or denied.

MS. HWANG: Thank you. So let's unpack that a little. Do you see the third-party processor on this flow chart?

MS. PIERCE: No.

MS. HWANG: Could you please draw in where the third-party processor would fit on the chart? Do you mind showing the Court where you just drew?

MS. PIERCE: Between the retailer and the EBT processor.

THE COURT: We have an overhead camera. If she puts it down there, then I can see it. There should be a mark on the desk somewhere there. It's kind of in front of the screen.

MS. HWANG: Miss Pierce, does the retailer get to pick its third-party processor?

MS. PIERCE: Yes.

MS. HWANG: And is the Federal Government a party to that contract?

MS. PIERCE: No.

MS. HWANG: Based off of your experience working in the SNAP retailer administration branch, do you know if there are more than ten third-party processors or fewer than ten [17] third-party processors?

MS. PIERCE: More than ten.

MS. HWANG: Can you name some examples of a third-party processor?

MS. PIERCE: First Data, Vantiv, Worldpay.

MS. HWANG: To your knowledge, what types of entities are third-party processors?

MS. PIERCE: Commercial entities.

MS. HWANG: You had also mentioned EBT processor. Who has the contract with the EBT processor?

MS. PIERCE: The state.

MS. HWANG: Does the state get to pick their EBT processor?

MS. PIERCE: Yes.

MS. HWANG: Is the Federal Government a party to that contract?

MS. PIERCE: No.

MS. HWANG: To your knowledge, how many EBT processors are there nationwide?

MS. PIERCE: Currently there are four.

MS. HWANG: Can you name the four EBT processors?

MS. PIERCE: Xerox, FIS, JPMorgan Chase, and Solutran.

MS. HWANG: I don't see Solutran on the EBT flow chart that we're looking at right now. Is there a reason?

MS. PIERCE: They are relatively new. They are taking on their first state right now.

[18] MS. HWANG: To your knowledge, what types of entities are EBT processors?

MS. PIERCE: Commercial entities.

MS. HWANG: So can you describe, looking back again at the flow chart, how the EBT processor sends information to FNS?

MS. PIERCE: They send two files to us. One is sent to the ALERT System and contains the detailed transactions that occurred at retailers in each state. They also send a file with the daily SNAP redemption totals for each retail location.

MS. HWANG: And can you describe what the STARS System is used for?

MS. PIERCE: It's used for managing SNAP retailer participation.

MS. HWANG: When you say "managing SNAP retailer participation," what do you mean?

MS. PIERCE: It receives information from our Online Application that reflects everything the retailer filled out in their application. It allows our contractor to indicate whether or not documents have been received as part of the application process.

It provides the ability to order a visit for a store and records the result of that visit, and records any case that may be opened against a retailer and the [19] results of those cases.

MS. HWANG: And does FNS use STARS for the purposes of paying SNAP retailers?

MS. PIERCE: No.

MS. HWANG: Does the EBT processor send SNAP information to any other FNS systems, other than STARS?

MS. PIERCE: No.

MS. HWANG: I think you previously mentioned ALERT. Is that correct?

MS. PIERCE: Yes.

MS. HWANG: So FNS also -- or, rather, the EBT processor also sends SNAP information to ALERT?

MS. PIERCE: Transaction data, yes.

MS. HWANG: I see. And what does ALERT stand for again?

MS. PIERCE: Anti-Fraud Locator using EBT Retailer Transactions.

MS. HWANG: And how is the information in ALERT different from the information in STARS?

MS. PIERCE: The information in ALERT is each individual transaction that occurred at any retailer location.

It would include information, such as the client's card number, the amount of the transaction, whether it was approved or denied, and whether it was swiped or the card number was entered manually.

MS. HWANG: And can you explain for me what the ALERT System [20] is used for?

MS. PIERCE: Fraud detection.

MS. HWANG: And does FNS use ALERT for purposes of paying SNAP retailers?

MS. PIERCE: No.

MS. HWANG: Other than ALERT and STARS, does the EBT processor send SNAP transaction or redemption information to any other FNS systems?

MS. PIERCE: No.

MS. HWANG: Does FNS receive store-level SNAP redemption data in any other way besides from the EBT processor?

MS. PIERCE: No.

MS. HWANG: Thank you for explaining how SNAP redemption flows to FNS.

Can we take a look back at the SNAP flow chart.

Can you please explain how the retailer's bank receives payment for SNAP transactions?

MS. PIERCE: Sure. The EBT processor each day will send an Automated Clearinghouse, or ACH, file to provide

payment to either the bank accounts of the third-party processors or directly to the retailer's bank account, if it's a retailer that has a direct relationship with them.

MS. HWANG: Great. And is there a difference between the information that the EBT processor puts in the ACH file and the SNAP redemption information that goes to STARS?

[21] MS. PIERCE: Yes.

MS. HWANG: How is the information in the ACH file different from the SNAP redemption information in STARS?

MS. PIERCE: The SNAP redemption information in STARS represents each retailer location. The payments data is for each bank account that gets paid.

MS. HWANG: So does that mean that the daily ACH file does not reflect payment information by store location?

MS. PIERCE: Correct.

MS. HWANG: You had previously mentioned third-party processors. Can you please draw in where third-party processors would be on this exhibit, showing the Court?

MS. PIERCE: (Witness indicating).

MS. HWANG: And does the Federal Government pay the SNAP retailer's bank directly?

MS. PIERCE: No.

MS. HWANG: Whom does the Federal Government pay?

MS. PIERCE: The EBT processor.

MS. HWANG: So does the Government payment occur before or after the retailer's bank or third-party processor's bank is paid?

MS. PIERCE: After.

MS. HWANG: Do you see the payment made by the Federal Government to the EBT processor on this exhibit?

MS. PIERCE: No.

[22] MS. HWANG: Could you please draw that payment on this exhibit to show the Court?

MS. PIERCE: (Witness complies).

MS. HWANG: Thank you.

MS. HWANG: I would like to offer into evidence Government's Exhibit 201-A. May I approach the witness to -- yes.

THE COURT: Yes. Again, you don't need to ask permission. Any objection to 201-A?

MR. ARNESON: No, Your Honor.

THE COURT: 201-A is received.

* * *

[22] CROSS EXAMINATION

* * *

[23] MR. ARNESON: But the money that the retailers get by being involved in the SNAP Program does essentially come from the Government. Does it not?

MS. PIERCE: Yes.

MR. ARNESON: And USDA, the Defendant in this case, does keep a record, does it not, of the annual amounts that are paid to the individual retailers participating in SNAP?

MS. PIERCE: We keep a record of the amount redeemed at each retail location.

* * *

[34] MR. ARNESON: What would you say?

MS. PIERCE: That we, through the EBT processors, are reimbursing SNAP retailers for transactions that occur at their location.

MR. ARNESON: Okay. But the money is coming ultimately from the Government. Correct?

MS. PIERCE: Yes.

MR. ARNESON: The benefits are flowing back to the beneficiary of the Government program. Correct?

MS. PIERCE: The benefits go to the recipient first. That's the first thing that happens. Then they use those benefits where they choose.

MR. ARNESON: To purchase food.

MS. PIERCE: Correct.

* * *

[35] REDIRECT EXAMINATION

* * *

[36] MS. HWANG: Can you just briefly describe, trying to explain as simply as possible, how the EBT payment process works?

MS. PIERCE: So the EBT processor determines the amount due to each third-party or each retailer, and pays those bank accounts, and then in the instance where they are paying the third-party processor, those third parties pay the retailers' bank accounts.

The EBT processor then, after that, seeks reimbursement from the Federal Government.

MS. HWANG: So that is how the process actually works?

MS. PIERCE: Yes.

MS. HWANG: Do you know, and I've asked this before, I know, but what is the information that was requested by Argus?

MS. PIERCE: Redemption data.

MS. HWANG: So does FNS currently use the term "SNAP redemption data" in the regular course of its business?

MS. PIERCE: Yes.

MS. HWANG: And is that the information that goes to STARS?

MS. PIERCE: Yes.

MS. HWANG: And can you describe for me what goes into the ACH file?

MS. PIERCE: That would be the amount that is due to be paid to each bank account for each entity that is getting [37] paid.

* * *

[40] DANIEL CLINE, called as a witness, being first duly sworn, testified as follows:

DIRECT EXAMINATION

MR. GASTON: Good morning. Could you please state your name for the Court.

MR. CLINE: Daniel Rory Pavis Cline.

MR. GASTON: Thank you. And for the record, can you spell your name?

MR. CLINE: Certainly. D-A-N-I-E-L R-O-R-Y P-A-V-I-S C-L-I-N-E.

MR. GASTON: Mr. Cline, please state where you work.

MR. CLINE: I work at the U.S. Department of Agriculture, Food and Nutrition Service, Supplemental Nutrition Assistance Program, Retailer Policy and Management Division, Retailer Management and Issuance Branch.

* * *

[57] MR. GASTON: Can you tell me how many retailers responded in total?

MR. CLINE: In total, we had 323 retailer comments.

MR. GASTON: 323. And that's represented in this table?

MR. CLINE: Yes.

MR. GASTON: I see. Mr. Cline, can you tell me what total of respondents opposed release of the information based on the grounds of CBI?

MR. CLINE: Two hundred and --

MR. GASTON: I'm sorry, I said based on the grounds of CBI, but that's just using the language in the spread sheet. Please continue.

MR. CLINE: 235 retailers opposed release of the data in [58] question.

* * *

MR. GASTON: I see. How many did not express opposition to the release of the information requested?

MR. CLINE: So if you look here, the opinion codes, there are three; "no opposition," "no comment," and "sales submission."

[59] MR. GASTON: Yes.

MR. CLINE: The "no opposition" comments were from retailers that stated, "I have no problem with the release of this data."

"No comment" are from retailers that simply stated they had no comment.

"Sales submission" reflects those retailers who believed that the RFI was a request for SNAP redemption data, and attempted to post their individual store-level SNAP redemption data in response.

MR. GASTON: So of these three groups in aggregate, how many responded this way to the question to the RFI?

MR. CLINE: There were 88 -- Table 2 reflects 88 retailer comments.

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[69] CROSS-EXAMINATION

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[81] MR. ARNESON: Did you contact most of those trade associations?

MR. CLINE: I believe so, yes.

MR. ARNESON: And just to refresh, you did not contact anybody that was in favor of disclosure?

MR. CLINE: No.

* * *

[94] ANDREA GOLD, called as a witness, being first duly sworn, testified as follows:

DIRECT EXAMINATION

MS. HWANG: Hello, Ms. Gold. Thank you for being here today. Ms. Gold, can you please state your full name for the record.

MS. GOLD: Andrea Gold.

* * *

MS. HWANG: And where are you employed?

MS. GOLD: I'm employed by the U.S. Department of Agriculture, Food and Nutrition Service, Supplemental Nutrition Assistance Program.

MS. HWANG: And what is your position at the Supplemental [95] Nutrition Assistance Program, SNAP?

MS. GOLD: I'm the Director of the Retailer Policy and Management Division under SNAP.

* * *

[98] MS. HWANG: Are you familiar with this lawsuit brought by the Argus Leader against the United States Department of Agriculture?

MS. GOLD: I am.

MS. HWANG: What is the information at dispute in this lawsuit, to your understanding?

MS. GOLD: Retailer redemptions for the period of 2005 through 2010 for all retailer locations across the [99] nation.

MS. HWANG: And is this at a national level, state level, or individual store level?

MS. GOLD: At the individual store level.

MS. HWANG: Approximately how many SNAP retailer locations' SNAP redemption data would be affected by this lawsuit?

MS. GOLD: Approximately 321,000 retailers.

* * *

[101] MS. HWANG: So as the RPMD Director, how familiar are you with the STARS System?

MS. GOLD: Very familiar.

MS. HWANG: What does STARS stand for? Could you tell me?

MS. GOLD: Store Tracking and Redemption System.

MS. HWANG: What information is contained in STARS?

MS. GOLD: It's where we house our demographic information.

MS. HWANG: And what do you mean by "retailer demographic information"?

MS. GOLD: So the information that retailers submit as part of the application process, the reauthorization, is housed in STARS.

MS. HWANG: And can you give me some examples of what that might include?

MS. GOLD: Sure. It includes a store name, the store location address, the mailing address, the telephone number, e-mail, the type of ownership, and ownership information, store hours.

Then information on gross and food sales, whether [102] that is estimated or as reported to the IRS.

At a high level, the kinds of foods that are sold in the store. Also, their non-foods inventory and sales.

* * *

MS. HWANG: And would FNS release, for instance, the gross sales information that a retailer submits?

MS. GOLD: No.

MS. HWANG: Why not?

MS. GOLD: That is confidential business information provided by a person.

MS. HWANG: Does the STARS database also include SNAP redemption data?

MS. GOLD: It does.

MS. HWANG: Does FNS receive SNAP redemption information? How does FNS receive SNAP redemption information?

[103] MS. GOLD: It comes to us from the EBT processors, who are contracted with each of the states that provide benefits to clients.

MS. HWANG: Does FNS receive SNAP redemption information in any other way?

MS. GOLD: No.

MS. HWANG: Does any other entity provide SNAP redemption information to FNS?

MS. GOLD: No.

MS. HWANG: Would the retailer's bank be able to provide that information to FNS?

MS. GOLD: I'm not sure.

MS. HWANG: But FNS does not currently receive that information from the retailer's bank or a third-party processor?

MS. GOLD: No.

MS. HWANG: Does FNS release SNAP redemption information in any form?

MS. GOLD: We do.

MS. HWANG: What form do you release the SNAP redemption information in?

MS. GOLD: We release aggregated redemption information at the nation, regional, state, county, zip code, and store-type level.

* * *

[104] MS. HWANG: How does the EBT processor receive information -- or, rather, how does FNS actually receive the SNAP redemption information? Where does it come from?

MS. GOLD: It comes from the state EBT processors.

MS. HWANG: Where does the state EBT processor receive that information?

MS. GOLD: It's information that is coming to them from the retailers that are operating in their – within the purview of that EBT processor.

MS. HWANG: So does the EBT processor receive that information from any other source?

MS. GOLD: No.

MS. HWANG: So how is that information generated to get to the EBT processor? Can you explain that for me?

MS. GOLD: Sure. So starting at the beginning, a client who is eligible for SNAP benefits has an EBT card and PIN. They use that card and PIN to go shopping at a retailer of their choice.

When they check out and they are paying for SNAP-eligible purchases, they swipe their card at the retailer's point of sale, enter their PIN number.

That transaction goes out to the EBT processor, who determines if the retailer is authorized, whether the [105] client has sufficient funds and an active card, and the PIN number is correct.

If all of those are true, the transaction comes back as approved. The client's account is debited. The retailer's

account is debited within two business days, business banking days.

* * *

[105] CROSS-EXAMINATION

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[109] MR. ARNESON: I'll get specific. I think we're asking for the annual amounts that are paid out under the SNAP Program to each individual retailer in the SNAP Program. Is that correct?

MS. GOLD: Yes.

MR. ARNESON: So when you say "redemption," and I say "payment," those numbers should be the same. Correct?

MS. GOLD: Ultimately they should be the same.

MR. ARNESON: So is this not essentially the simplified version of a Government program that's a quid pro quo?

The retailers provide goods, and the Government pays the money? Is that a simplistic version of what happens?

MS. GOLD: The Government reimburses retailers for the goods provided.

MR. ARNESON: But they are the ones that produce the money -- I mean produce the benefits. Right?

MS. GOLD: Yes.

MR. ARNESON: So the shorthand version is the Government is paying for this program?

MS. GOLD: Yes. The U.S. Treasury is paying for this program. Yes.

MR. ARNESON: The Treasury. That's the Government. That's the United States taxpayers. Is it not?

[110] MS. GOLD: Yes.

MR. ARNESON: So all this EBT stuff is really just a way to facilitate that arrangement. Is that correct?

MS. GOLD: Those are the mechanics of the payment.

MR. ARNESON: Those are the mechanics of the payment. Thank you. The payment.

* * *

[165] JOEY HAYS, called as a witness, being first duly sworn, testified as follows:

DIRECT EXAMINATION

MS. BENGFORD: Good afternoon. Could you please state your name and spell your name for the record.

MR. HAYS: Joey, J-O-E-Y, Hays, H-A-Y-S.

MS. BENGFORD: Mr. Hays, are you employed?

MR. HAYS: Yes. Dyer Foods, Incorporated.

MS. BENGFORD: What is your position with Dyer Foods, Incorporated?

MR. HAYS: I am the president and owner.

* * *

[176] CROSS-EXAMINATION

* * *

[188] MR. ARNESON: Mr. Hays, do you actually provide your SNAP information to the Government directly?

MR. HAYS: No.

MR. ARNESON: And the amount of SNAP business that you do, who ultimately pays for that? Do you know?

MR. HAYS: We use First Data. That's our third-party processor, First Data. So that's where we get our money is through them.

Of course it's all -- the Federal Government is given that money at some point, but we don't deal with the Federal Government on it.

MR. ARNESON: But you are ultimately getting paid by the Federal Government. Is that true?

MR. HAYS: It's a Federal program, so I would think so.

MR. ARNESON: Federal program. I think you said a couple of times you consider the SNAP payment amount personal, confidential, and I get it.

But it is what the Government is paying you under a Government program. Is that fair?

MR. HAYS: A customer comes in our store with an EBT card. On that card they have -- it's like a debit card. So it [189] could be a welfare money that's on that card, cash, that they can take off of that card, or they could have money on that card to pay for food.

So just like a credit card, debit card, cash, or check, that's their form of payment for the product in our store.

So just like in welfare, where the money is ultimately given to by the state or whatever, and that Food Stamps are provided by the Federal Government at some point like that.

So it's a form of payment for goods and services in our stores.

MR. ARNESON: And it's ultimately at the top level -- the top of the food chain, no pun intended, it's the Government paying. Is that fair?

MR. HAYS: Sure. Yes.

* * *

[198] ANDREW JOHNSTONE, called as a witness, being first duly sworn, testified as follows:

DIRECT EXAMINATION

MS. BENGFORD: Would you state your name and spell your name.

MR. JOHNSTONE: Andrew Johnstone. That's A-N-D-R-E-W J-O-H-N-S-T-O-N-E.

MS. BENGFORD: And are you currently employed?

[199] MR. JOHNSTONE: I am.

MS. BENGFORD: And how are you employed?

MR. JOHNSTONE: I am employed as associate general counsel for Sears Holdings Management Corporation.

* * *

[204] MS. BENGFORD: And does Kmart release financial information as to Kmart?

MR. JOHNSTONE: So Sears Holdings is a publicly traded company, and we make financial disclosures consistent with the SEC's rules and regulations.

Kmart is a wholly owned subsidiary of SHC, so we do not do separate financial reporting.

I know that in the SHC financial statements, there's some high-level information about K-Mart's [205] performance. But, no, we do not specifically publish comprehensive Kmart financials.

MS. BENGFORD: And why not?

MR. JOHNSTONE: We don't think that there's any competitive advantage to us in providing that information.

To the contrary, we think K-Mart's financial performance, that's confidential and proprietary.

MS. BENGFORD: And do you provide individual SNAP information publicly? Is that available?

MR. JOHNSTONE: No. We do not publish or make available in any way SNAP information as to Kmart.

MS. BENGFORD: Do you take certain protections within the company to protect this type of information?

MR. JOHNSTONE: So as with all confidential, business, trade-secret type information, we do take

various steps to protect it from disclosure, whether deliberate or indifferent.

All of our employees are trained that they have an affirmative obligation to maintain the confidentiality of our financial information. They get regularly trained on that.

Sears Headquarters is located in Hoffman Estates, Illinois, outside of Chicago.

The Sears Campus, where most of the management and financial-type people actually work, is a closed [206] campus. You can't get on to the campus without being an employee with a badge. Or if you're a visitor, you have to be escorted at all times. You have to be checked in.

And then there's -- our computer networks, we have an IT department that works to keep the security of our computer networks, and ensure that the information that we maintain is not available, that it's kept confidential.

* * *

[207] MS. BENGFORD: I'm sorry if I already asked, but I just want to make sure I did. The SNAP information has the same level of confidentiality and protections that you previously described?

MR. JOHNSTONE: It does. It's not something that we disclose or publish. It's not something that's publicly available in any way.

* * *

[210] MS. BENGFORD: Well, I asked if you had expectations regarding SNAP data.

MR. JOHNSTONE: Well, I mean it is certainly K-Mart's expectation, when it submits that information to the Government, that that is not going to be publicly available.

* * *

[230] MS. BENGFORD: I know you haven't been innately involved in SNAP, per se, with Kmart. But would you not agree that some competition is good for the SNAP recipient?

MR. JOHNSTONE: I mean I think competition is good for America.

MS. BENGFORD: Thank you.

MR. JOHNSTONE: So I'm sure to the extent there's competition in retailers, that ultimately benefits consumers, including SNAP purchasers. So, yes, I agree with that.

MS. BENGFORD: So competition is good for America, but not too much competition?

MR. JOHNSTONE: I don't think I'm saying that.

I'm saying that information that we consider proprietary and confidential that we submitted to the [231] Government, with the understanding that it would be kept confidential, we're concerned that the release of that will cause us substantial competitive harm.

You can say that that's the impact of the free market, if that's your view.

All I can say is we are concerned about what we think the likely negative effects are of the release of the information, which is information we keep confidential and we don't disclose to anyone.

* * *

[234] PETER LARKIN, called as a witness, being first duly sworn, testified as follows:

DIRECT EXAMINATION

MS. BENGFORD: Good afternoon, Mr. Larkin. Could you please state your name, and spell your name for the record.

MR. LARKIN: Peter Larkin. P-E-T-E-R L-A-R-K-I-N.

MS. BENGFORD: And are you currently employed?

MR. LARKIN: Yes, I am.

MS. BENGFORD: Who is your current employer?

MR. LARKIN: The National Grocers Association.

MS. BENGFORD: And what is your position with the National Grocers Association?

MR. LARKIN: I'm the president and CEO.

* * *

[250] MS. BENGFORD: So for the retailer side, for those privately [251] held corporations, do you know, do they release financial information publicly?

MR. LARKIN: Never. Not publicly. They may release it to business partners, where they are trying to obtain a loan or build a new store, but not publicly.

MS. BENGFORD: And they take certain protections to maintain the confidentiality of that information?

MR. LARKIN: They absolutely do. They limit it to as few people as possible within their organization due to the confidential nature of that information.

* * *

[291] REDIRECT EXAMINATION

MS. BENGFORD: Mr. Larkin, can you ignore sales data when looking or assessing competition?

MR. LARKIN: No.

MS. BENGFORD: And so then its actual SNAP sales individual store data, you believe that's a key piece?

MR. LARKIN: Absolutely.

MS. BENGFORD: And why is that?

MR. LARKIN: Because anybody that wants to locate a new store or compete with their current competitor now knows, you know, X number of dollars are available that are going to that competitor, and they're going to do

everything they can to capture for that percentage, whatever they can, out of that dollar amount.

[292] In today's world, they have ways of guessing. They have ways of estimating. They have market research they can do. But there is no place where they can get the actual data.

And when our members signed up for the program, they always felt that it was confidential, private, and it was never going to be released.

* * *

[314] MARY GWEN FORMAN, called as a witness, being first duly sworn, testified as follows:

DIRECT EXAMINATION

MS. BENGFORD: Could you please state your name, and spell your name for the record.

MS. FORMAN: Yes. My name is Mary Gwen Forman. M-A-R-Y G-W-E-N F-O-R-M-A-N.

MS. BENGFORD: And are you currently employed?

MS. FORMAN: I am.

MS. BENGFORD: Who is your current employer?

MS. FORMAN: I work for Cumberland Farms.

MS. BENGFORD: And what is your position with Cumberland Farms?

MS. FORMAN: I'm the senior vice president of marketing.

* * *

[320] MS. BENGFORD: As a privately held business, does Cumberland Farms release any financial information?

MS. FORMAN: We do not.

MS. BENGFORD: Why do you not release your financial information?

MS. FORMAN: Because we believe that that could be used against us by competitors.

MS. BENGFORD: What about SNAP information? Does Cumberland Farms keep information as to individual store SNAP sales privately?

MS. FORMAN: We do, yes. Absolutely.

MS. BENGFORD: Do you release that information to anyone?

MS. FORMAN: No.

MS. BENGFORD: What about, does Cumberland Farms take any protections within Cumberland Farms to keep sales and SNAP information confidential?

MS. FORMAN: Yeah, absolutely. So we have a large number of employees as a retailer, and we keep that information among a very tight group of the senior management team.

MS. BENGFORD: Is individual store sales information as to SNAP -- I'm sorry, let me rephrase the question.

Is individual store sales information available to you in the convenience store industry?

MS. FORMAN: You mean not our own?

MS. BENGFORD: Correct.

[321] MS. FORMAN: It is not, that I know. I've never seen that published.

MS. BENGFORD: And what about SNAP information? Can you obtain individual store SNAP information anywhere?

MS. FORMAN: Not outside of our own.

* * *

[336] THE COURT: Ms. Gold, if you would retake the witness stand.

Mr. Thelen, if you could take Exhibit 201 with you.

I just want to remind you that you are still under oath to tell the truth.

ANDREA GOLD, recalled as a witness, having been previously sworn, testified as follows:

* * *

[337] THE COURT: And are there some retailers that do not use a third-party processor?

MS. GOLD: Yes. There are some retailers that are not required to provide their own service.

And so they have an option -- they continue to have an option to get Government-owned equipment at no cost.

It's a small group of exempt retailers that include farmers markets, direct marketing farmers, and some farm meal services.

THE COURT: So there the arrow would go directly from the retailer down to FNS, without going to the EBT processor?

[338] MS. GOLD: No. They still come through the EBT processor. They're just -- they would not -- the circle that shows the third-party processor would not be there.

THE COURT: So all of the data that FNS is receiving comes from the EBT processor?

MS. GOLD: Yes.

* * *

[340] RICHARD VOLPE, called as a witness, being first duly sworn, appearing by videoconference, testified as follows:

DIRECT EXAMINATION

* * *

MR. ARNESON: Could you please state your name and spell it for the record, please?

DR. VOLPE: My name is Richard Volpe. R-I-C-H-A-R-D. Last name Volpe, V-O-L-P-E.

* * *

[341] MR. ARNESON: What do you do for work?

DR. VOLPE: Our agribusiness department -- here in San Lu'ɜ Obispo.

MR. ARNESON: Should I have him repeat that? Ricky, you blitzed out on us. Can you repeat that?

DR. VOLPE: Sorry.

MR. ARNESON: Oh, it's not your fault.

DR. VOLPE: I'm an assistant professor in the agribusiness department here at the California Polytechnic State University in San Luis Obispo.

MR. ARNESON: And what does that involve in terms of your job?

DR. VOLPE: My appointment is a combination of teaching, research, and service. I'm expected to teach between five and six classes per year, conduct research on matters that are relevant to the agribusiness program, and to reach out to and interact with industry professionals throughout California.

MR. ARNESON: What is your educational background?

DR. VOLPE: I have a Bachelor's of science. Sorry?

MR. ARNESON: I just meant post-high school. Thank you. You're on.

[342] DR. VOLPE: I have a Bachelor's of science from the University of Massachusetts at Amherst, and that was a degree in mathematics and economics.

I have a Master's of science in resource economics also from UMass Amherst, and I have a Ph.D. in agricultural and resource economics from the University of California Davis.

MR. ARNESON: Could you briefly describe what your professional experience has been in the job market since you received your Ph.D. or even before?

DR. VOLPE: I received my Ph.D. in 2010 -- and I spent four years there conducting policy-relevant research before taking this job here at Cal Poly.

MR. ARNESON: I think you blanked out on us again. I'm going to ask you to repeat where you spent your last four years.

DR. VOLPE: I spent four years at the USDA Economic Research Service in Washington, D.C.

MR. ARNESON: And what did you do in that capacity?

DR. VOLPE: I was a research economist. I was tasked with conducting original research on policy-relevant issues to USDA. My specific office was focused on issues related to food markets; essentially, the economics of the food supply chain.

MR. ARNESON: Have you had any publications in your name?

[343] DR. VOLPE: Yes.

MR. ARNESON: Could you give us a brief listing of publications that you would consider to be connected to that food research?

DR. VOLPE: Sure. Well, nearly every peer-reviewed publication that has my name on it is related to research on food. This is a combination of journal articles in academic scholarly journals and research publications under the USDA banner.

I don't have the exact count. It's probably somewhere near 20 or so publications, if you combine the two types.

But I have done research on food prices, food choices, and the behavior of supermarkets; specifically, the competitive behavior of supermarkets.

* * *

[351] MR. ARNESON: Is it also part of your opinion that there is a variety of available information already in existence that can be used to make marketing decisions?

DR. VOLPE: Yes. Specifically, I understand that there is concern about these SNAP data revealing aspects of the competitive strategy of certain retailers.

However, I would argue that the competitive strategy of a food retailer, at least how I think of it, consists largely of aspects or components that are readily available simply by visiting the store.

So, for example, competitors are frequently interested in the prices, the promotional activity, the store layout, the level of customer service, and the product assortments for their competitors, and rightfully so. It's important to understand the behaviors in which your competitors are engaging in order to inform your own competitive strategy.

However, this information is available publicly. All you have to do is walk in the store, and this becomes readily apparent. Therefore, the additional insights that may be gleaned regarding competitive strategy specifically from the SNAP data in my opinion seems very limited.

[352] MR. ARNESON: If a competitor saw a store with good SNAP data, if it were disclosed, through what process do you think it would try to use that information competitively?

DR. VOLPE: Well, I imagine that it is possible that the release of a time series of annual SNAP data at the store level can enable for this sort of benchmarking analysis.

So, for example, a competitor looking at the SNAP data that have been released for various SNAP retailers are then able to observe whether or not SNAP revenues are growing or shrinking over time.

Now, a number of assumptions can be drawn from this information. But I just want to be very careful in saying that each of these assumptions can very easily be wrong, and I would expect that either potential or current competitors who gain access to these data would understand that.

Just to give one example to illustrate this. Suppose the SNAP redemption data indicate growth year over year. Well, does this reflect that the store in question is seeing its performance in profitability through changes in its pricing and promotional strategy? Maybe.

But it might also reflect simply the fact that the local demographics are evolving and SNAP enrollment are up, and it has nothing to do with this store's [353] competitive strategy.

Those are just two competing hypotheses which cannot be disentangled from one another using the SNAP data.

MR. ARNESON: Are you saying, just to make sure I understand, that -- well, let me strike that.

Well, what would the SNAP data be able to tell you, as an outside competitor, about profitability or gross sales that would include non-SNAP material?

DR. VOLPE: On its own?

MR. ARNESON: On its own.

DR. VOLPE: On its own, nothing. The SNAP data on their own, even if the SNAP redemptions are increasing year over year, it's entirely plausible that the profitability and performance for that store on average is going down.

It's not difficult to imagine how SNAP redemption in overall store revenues might actually be negatively correlated over time.

For example, if it's true that there is a strong negative stigma associated with SNAP customers, then that would make perfect sense to me, that as a store sees its SNAP

enrollment increasing due to changes in regulations or changes in local demographics, this stigma drives away non-SNAP customers, and the overall store performance is actually down.

[354] So just to answer your question, no, based on the SNAP data alone, I can't really say anything about a store's profitability or its overall gross profits or sales or anything like that.

MR. ARNESON: Well, and I think we've established there is information available to use in connection with this, if this were available. How does that change your view?

DR. VOLPE: Well, this gets back to my kind of the first major point I made about the difficulty that any outsider, any potential competitor would have in using the SNAP data to identify changes in, you know, store performance or profitability or anything along those lines.

So, for example, could a retailer, an outside retailer use those SNAP data? For the sake of argument, let's just say an outside retailer is only interested in SNAP redemptions and seeks to increase their SNAP redemptions. And that's important, because there's absolutely no way that an outside retailer could use SNAP redemption data to glean more specific information about overall store sales or overall store products.

So for the sake of simplicity, we'll restrict our focus only to potential competitors who are interested in SNAP redemption data.

Now, this cleans up the story a little bit, [355] because now potential competitors are able to look at these stores and see, "Okay, for example, over the last three years SNAP redemption data are up. This indicates to me that this might be a great neighborhood for us to move into."

Well, in order to disentangle, for example, the store effect, did this store see SNAP revenues increasing

because it's becoming a better store, it's offering better prices, it's doing a better job of attracting customers, or is it simply because the market is changing? These are, of course, two very different possibilities that would lead to two very different decisions on the part of a potential competitor.

Well, would it be possible to gain some insights into this? Sure. But a potential retailer would need to create a data set, a data set that controls for a large number of other potential confounding factors. So this data set would need an awful lot more than simply annual SNAP redemption data.

We would need information on that store's competitive strategy; prices, promotions, store layout, customer services and so on. Also, detailed time series information on local demographics; income, ethnicity, car ownership. All these factors drive food retail patronage and store selection and all that.

[356] Would it be possible to build this data set and then construct a properly specified model to disentangle potential outcomes and use the SNAP data to gain information on competitors that previously was unavailable? Yes. I do not rule that possibility completely out.

However, the work involved in this, and I'm speaking of somebody who has been doing this sort of work for years, is very involved. To build this data set would be very time-consuming, and would involve a large number of visits to the store in question, and a lot of different choices about, for example, how do we measure prices over time? How do we measure assortment over time? Which demographics do we focus on? How do we account for distances across stores?

There are many, many questions that need to be sorted out. In some cases the answers to these questions aren't

true, which all comes back to my main point that the construction of this data set and the proper analysis, data analysis, running this model identifying effects, would be very difficult, expensive, time-consuming, and highly unlikely to occur.

* * *

[361] MR. ARNESON: Do you have any knowledge of the tendency of people, consumers in the grocery business, their loyalty in terms of grocery shopping to a particular store?

DR. VOLPE: I understand that there is a body of work, a combination of there have been peer-reviewed studies looking into the factors behind store switching, and, of course, there are surveys that are readily available, many of them are readily available on the Internet that look into this issue, and the consensus seems to be that store-switching among households is relatively rare. It's relatively uncommon.

* * *

[369] RYAN SOUGSTAD, called as a witness, being first duly sworn, testified as follows:

[370] DIRECT EXAMINATION

MR. ARNESON: Dr. Sougstad, could you please state and spell your name for the record?

DR. SOUGSTAD: Yes. Ryan Sougstad. R-Y-A-N S-O-U-G-S-T-A-D.

MR. ARNESON: And where do you live?

DR. SOUGSTAD: I live in Sioux Falls.

MR. ARNESON: And what do you do?

DR. SOUGSTAD: I'm an associate professor of business administration at Augustana University.

* * *

[375] MR. ARNESON: And would it be your understanding that the question is whether the annual amounts paid to SNAP retailers, if disclosed, is likely to cause substantial competitive harm to those SNAP retailers whose information is disclosed?

DR. SOUGSTAD: Yes.

MR. ARNESON: Would you please state what your opinion is.

DR. SOUGSTAD: I do not believe that organizations will face or are likely to face substantial competitive harm due to the release of SNAP data.

MR. ARNESON: And would you please explain for us how you arrived at that opinion?

DR. SOUGSTAD: Yes. Overall, it's my opinion that organizations have such a breadth of data available to them to make strategic decisions, that the SNAP data itself is going to be marginal of value in the analysis they use.

The arguments I've seen seem to rely on this foundation, that there are stores or organizations that are protected somehow by this veil of secrecy, and if [376] this SNAP data is revealed, they are going to suffer substantial competitive harm, which I mean to believe loss of profitability. But I do not believe that to be the case.

I believe, fundamentally, that organizations and retailers need to focus on a competitive strategy. That's what's going to drive the location decision.

So what is the competitive value? How is a retailer going to compete? Those are very detailed analyses that are required. So I can imagine a large retailer will be looking first and foremost at their own data set of existing customers and be able to look at demographic data that's widely available, and be able to make a very informed location decision, with or without the SNAP data.

* * *

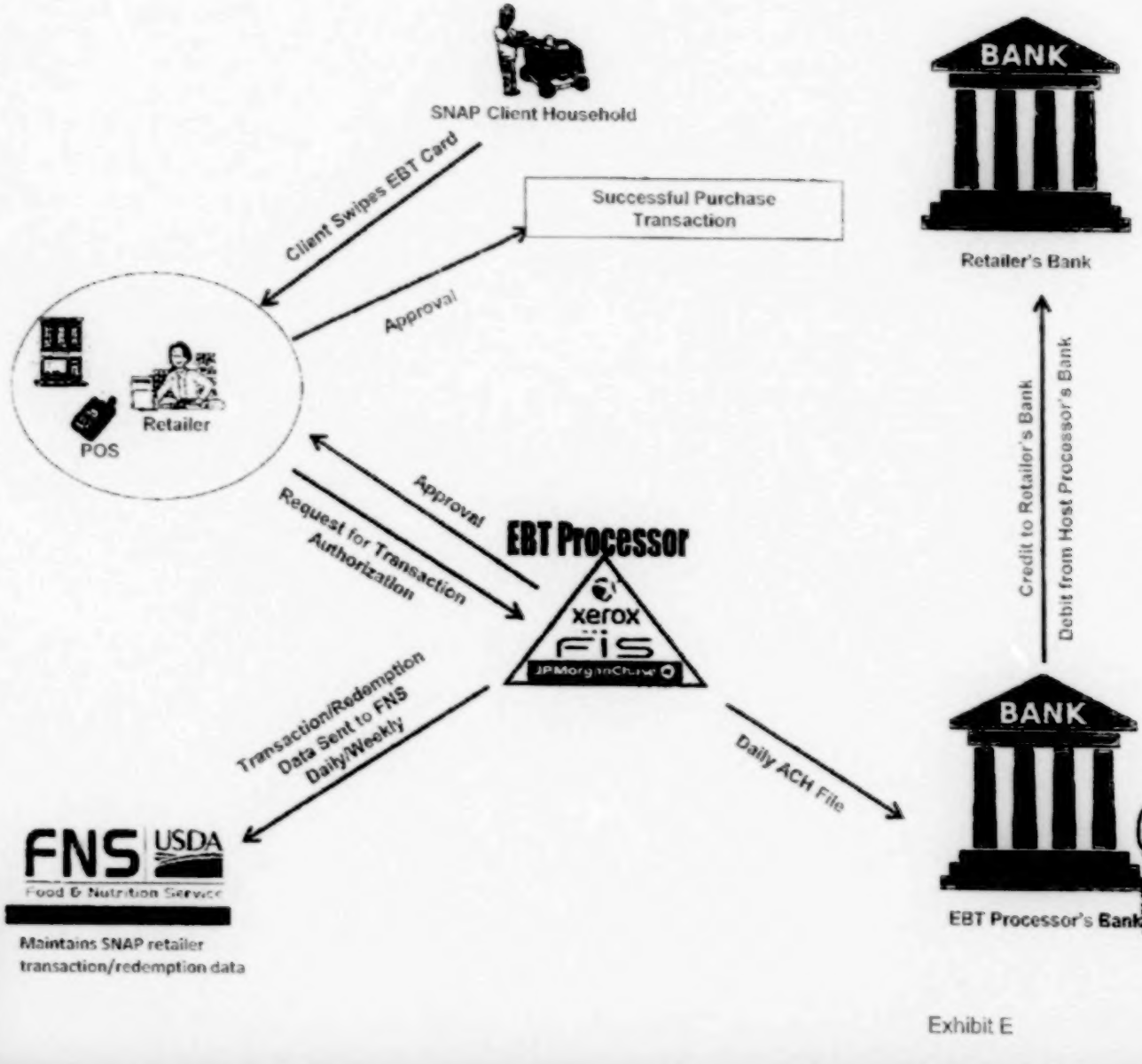

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Exhibit E

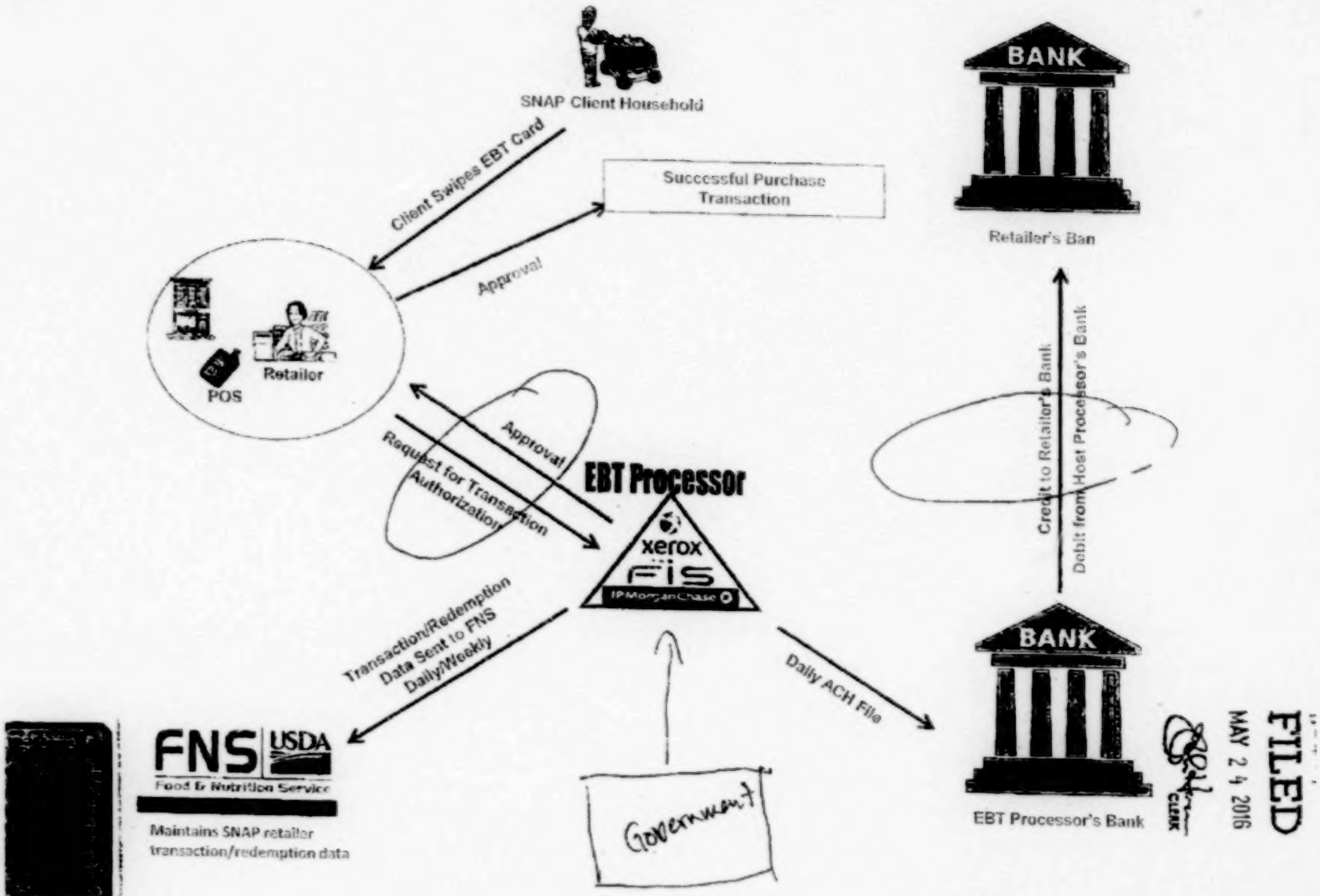

Exhibit E

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